TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 236

DOLLREE MAPP, ETC., APPELLANT,

vs.

OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 14, 1960

PROBABLE JURISDICTION NOTED OCTOBER 24, 1960

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[fol. A]

IN CLEVELAND MUNICIPAL COURT

Examining Court

THE STATE OF OHIO,
CUYAHOGA COUNTY, ss.:

THE STATE OF OHIO

vs.

DOLLREE MAPP

CHARGE

Poss. of Obscene Pictures & Books

Defendant arrested on a warrant founded on an affidavit charging Dollree Mapp with Poss. of Obscene Pictures & Books as therein set forth; said affidavit being made before the Clerk of this Court, by Michael Haney on the 25 day of May A. D. 1957.

Warrant returned on the 27 day of May A. D. 1957, by FRANK T. KELLY, Bailiff of Cleveland Municipal Court, with the body of the defendant and after the examination before Andrew Kovachy Judge of the Court, it is ordered and required of the said defendant that he furnish bail for his personal appearance at the present term of the Court of Common Pleas of Cuyahoga County on the first day of the term thereof, in the sum of $5000.00 or $2500.00 R.E. dollars, or in default thereof to stand committed.

State of Ohio, City of Cleveland, ss.

I, JOHNNY KILBANE, Clerk of Cleveland Municipal Court, do hereby certify that the foregoing is a true transcript of the proceedings had before the said Court in said cause as fully as the same appears on record.

Given under my hand and the seal of said Court this 25 day of June, 1957.

Helen J. Lyons, Clerk of Cleveland Municipal Court.

B

[fol. B]

IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY
STATE OF OHIO

INDICTMENT FOR POSSESSION OBSCENE LITERATURE
R C 2905.34—Filed October 8, 1958

THE STATE OF OHIO,
CUYAHOGA COUNTY, *ss.*:

Of the term of September In the year of our Lord one thousand nine hundred and fifty seven.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

Do Find and Present, That Dolly Mapp on or about the 23rd day of May 1957, at the County aforesaid, unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious Books, Pictures and Photographs, said Books, Pictures and Photographs being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed upon the records thereof contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

John T. Corrigan, Prosecuting Attorney.

[fol. C]

IN THE COURT OF COMMON PLEAS

Case No. 68326

[Title omitted]

MOTION TO SUPPRESS EVIDENCE—Filed September 3, 1958

Now comes the defendant by her attorney, A. L. Kearns and moves this honorable court for an order suppressing the evidence procured by the police officers, to wit:

Certain claimed lewd and lascivious Books, Pictures and Photographs and intended to be used in evidence in the trial of the aforesaid cause.

For the reason that the aforesaid evidence was not procured by a proper search warrant as provided by Section 2905.35 of the Ohio Revised Code.

A. L. Kearns, Attorney for Defendant.

NOTICE

The State of Ohio will take notice that the defendant has filed the aforesaid motion and that the same will be set for hearing in Court Room No. 1 of the Court of Common P. as Criminal Branch in accordance with the rules of said court.

A. L. Kearns, Attorney for Defendant.

[fol. D] Copy of aforesaid motion received this 3rd day of September, 1958.

John T. Corrigan, Prosecuting Attorney.

[File endorsement omitted]

[fol. E]

IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY
STATE OF OHIO

No. 68326

Indictment Possession of Obscene Literature

STATE OF OHIO, Plaintiff,

—VS—

DOLLREE MAPP (DOLLY MAPP), Defendant.

EXCERPTS FROM DOCKET AND JOURNAL ENTRIES

* * * * * * *

[fol. F] September 3, 1958: Motion to Suppress Evidence filed.

September 3, 1958: To Court: This cause came on this day for hearing on defendant's motion to suppress evidence, and the court upon hearing overrules the same.

* * * * * * *

D

[fol. G] And the said jury having heard all the testimony adduced by the parties, the arguments of counsel, and the charge of the court, retired to their room, in charge of the bailiff, for deliberation. And now come the jury, conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Dollree Mapp guilty of possession of obscene literature as charged in the indictment."

. . . . . .

[fol. 1]

IN THE COURT OF COMMON PLEAS

CRIMINAL BRANCH

No. 68326

STATE OF OHIO, Plaintiff,

vs.

DOLLREE MAPP, Defendant.

Defendant's Bill of Exceptions

[fol. 3] State of Ohio,
County of Cuyahoga, *ss.*:

IN THE COURT OF COMMON PLEAS

CRIMINAL BRANCH

No. 68326

STATE OF OHIO, Plaintiff,

vs.

DOLLREE MAPP, Defendant.

Be It Remembered That, heretofore, to-wit, on Wednesday, the 3rd day of September, 1958, being one of the regular days of the September, 1958, term of said court, this cause came on for trial before Hon. Donald F. Lybarger,

one of the judges of said court, and a jury, in Courtroom No. 1, and the following proceedings were had:

The Court: This is the matter of the State of Ohio versus Dollree Mapp. The defendant and counsel are in court, the prosecutor is in court. I have before me a motion to suppress evidence. Mr. Kearns, you bring that on behalf of the defendant?

[fol. 4] Mr. Kearns: Yes. May it please your honor, this motion to suppress the evidence in this case is based upon Section 2905.35 of the Ohio Revised Code, which became effective October 6, 1955; the statute under which this defendant has been indicted became effective October 6, 1955. We are well aware of the decision of the Ohio Supreme Court by a four to three vote of the Lindway case in 131 Ohio State. But that is many years prior to the passing by our legislature of this particular statute under which this defendant is charged, and the decision of the Supreme Court in the Lindway case is many years prior to the passage of the search warrant statute by our legislature, providing the search warrant for matters mentioned in 2905.34.

We therefore say to this court very respectfully and earnestly that the legislature undoubtedly was aware of the decision in the Lindway case at the time that they passed these two statutes, 34 and 35, providing for search warrants in matters pertaining to 34. So we say to your honor that it is necessary under these statutes enacted by our legislature, that a search warrant set forth such statutes specifically by a magistrate or a judge of any court having jurisdiction . . . shall issue warrants to search such house [fol. 5] or place upon written complaint, supported by oath or affirmation, that any person within the jurisdiction of such magistrate or court, has violated or is violating the several sections thereto, including Sections 2905.33 and 34, of the Revised Code, may issue a warrant to search a building or other place where such item may be located," and so on.

Now we say that the State of Ohio did not have a search warrant setting forth the items that are mentioned in this indictment, and which the State of Ohio intends to use

as evidence in this cause against this defendant, and for that reason we are asking that that particular evidence be suppressed.

[fol. 8] Plaintiff's Case

Whereupon the plaintiff, to maintain the issues on its part to be maintained, called as a witness, MICHAEL HANEY, who, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mrs. Mahon:

Q. State your name, please.
A. Michael Haney.
Q. Your address?
A. 14026 Berwald Avenue, Cleveland.
Q. Are you a member of the Cleveland police department?
A. I am.
Q. And assigned to what department?
A. The bureau of special investigations.
Q. What is your title?
A. I am a patrolman assigned to the bureau of special investigations.

[fol. 9] Q. How long have you been a police officer?
A. Twelve and a half years.
Q. Do you have a partner that you work with, officer?
A. Yes, I have two partners.
Q. What are their names?
A. Sergeant Carl Delau and patrolman Thomas Dever.
Q. Directing your attention to May 23 of last year, 1957, did you and your partners have occasion to go to the home of one Dolly Mapp?
A. Yes, we did.
Q. And where did she live at that time?
A. 14705 Milverton Road, upstairs.
Q. Can you describe that place, officer?
A. It is a two-family brick dwelling, suite down and

suite up; there is a front entrance and a side entrance, full basement underneath the premises; there is a living room, kitchen, dinette, two bedrooms and bath on the second floor.

Q. Did she live on the second floor?

A. Yes, she did.

Q. Is that a brick or a frame home?

A. That is a brick home.

Q. Were you with Delau and Dever then?

A. Yes.

Q. About what time did you get out there?

A. About one or one-thirty in the afternoon.

[fol. 10] Q. Do you see the Dolly Mapp that you refer to in the courtroom here?

A. Yes, I do.

Q. Will you point her out?

A. She is seated opposite yourself at the table behind Mr. Kearns.

Mrs. Mahon: Indicating the defendant.

Q. Do you know her by any other name?

A. Yes, by Dollree Mapp, or Dollree Bivins.

Q. What was the purpose of you officers in going to her home on that particular day?

A. On that particular day we had received information from a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home, either in the basement or the suite on the second floor.

Q. Do you know who occupied the first floor suite?

A. No.

Q. Did you have occasion while you were out there to go into the first floor suite at all?

A. Only to the door of the first floor suite.

Q. After you arrived there what happened?

A. Upon our arrival at the address we rang the bell at the side of the house for the second floor; Mrs. Mapp came to the window and asked us what we wanted. We stated [fol. 11] we would like to come in and talk to her, and she stated—first, she wouldn't let us in, and then she stated—after several minutes of conversation she said, "I'll call

my attorney, Mr. Green, and see if he thinks I should let you in." She then removed herself from the window and came back and she said "I have been advised by my attorney not to let you in without a search warrant." A search warrant was brought out after an hour and a half or two hour delay, brought to the premises, and the officers were admitted by Mrs. Mapp from the sidewalk.

Q. Then what happened?

A. I remained outside until a considerable length of time, and see that nobody left the premises. After they had been admitted Sergeant Delau called me and said "Come on in." I went to the second floor, where he proceeded to search the second floor of the residence there, and went to the rear bedroom there, which, as we were about to enter, Mrs. Mapp said "This is my room." Mrs. Mapp sat on the bed when Delau proceeded to search the chest of drawers on the left wall as you leave the room. I began searching a dresser which would be located on the rear wall beside the bed in that room. In searching through the dresser I came upon four books. In removing them Mrs. Mapp saw them and said, "Better not look at those; they [fol. 12] might excite you." I then looked at the books and found them to be obscene. I further made search of the dresser and found nothing else in that. I searched the suit cases and found a photo album pictures of herself. Among other stuff a pencil drawing on paper of a very obscene nature. Upon showing it to Mrs. Mapp she refused to say anything more about it, offer any more comment, what it was and why it was there.

Q. You say that was in the suit case?

A. That was in the suit case beside the bed in the rear bedroom.

Q. The same bedroom?

A. The same bedroom, yes.

Q. Do you know who that belonged to?

A. Mrs. Mapp stated it was her suitcase. Also in the suitcase we found personal papers with Mrs. Mapp's name on them.

Q. Then what did you do?

A. During this time we were up in the bedroom together, Sergeant Delau found four separate groups of vulgar pic-

tures. We took all the evidence, put it together, conveyed Mrs. Mapp and the stuff to the Central Police Station, and consulted the police prosecutor, and warrant was issued for the arrest of Mrs. Mapp.

Q. Where were the pictures found?

A. In the chest of drawers, the same bedroom in which we had found the other stuff.

[fol. 13] Q. Was any other person in that suite at the time you were conducting this search, officer?

A. There were other police officers there.

Q. I mean besides police officers?

A. Not to my knowledge.

Q. Did you have any conversation with Mrs. Mapp as to who occupied her suite?

A. We questioned who occupied her suite, and she said her and her daughter, Barbara, occupied the suite at that particular time, yes.

Q. You said there were two bedrooms?

A. Yes, there were two bedrooms, one coming off the hallway by the bath, bedroom off to the left, which we checked. It had child's clothing, child's paraphernalia, child's room. Directly to the rear of the residence is the room occupied by Mrs. Mapp. She stated at the time the stuff might belong to Morris Jones, who had lived in that room, yet there was no men's clothing, clothing men would have.

Q. There were ladies' clothing in that bedroom?

A. Yes, in that bedroom.

Q. Ladies paraphernalia?

A. Cosmetics, and so forth.

Q. How long were you out there altogether that day?

A. I would say we were out there two and a half or three hours.

Q. Did you have any occasion to go into the basement at [fol. 14] that place while you were there?

A. I don't believe I was in the basement at all.

Q. Did any of the other officers go there?

A. Yes, patrolman Dever searched the basement; I don't know whether Sergeant Delau was down there or not.

Q. You say you took Mrs. Mapp into the station then?

A. Yes, we did.

Q. What did you do with those books and pictures, and so forth?

A. They were marked for identification and turned over to the property room at Central Police Station.

Q. This home of Mrs. Mapp's, is that in Cuyahoga County?

A. Yes, it is.

Q. Is that Cleveland?

A. That is in Cleveland.

Q. In Cleveland proper?

A. Yes.

Mrs. Mahon: Mark these.

(Thereupon booklets were marked by the reporter for identification State's Exhibits 1, 2, 3, 4, respectively.)

Q. You were present when Sergeant Delau found the pictures here in the dresser?

A. Yes, I was.

Q. Officer, showing you what is identified as State's Exhibit 1, what can you tell us about that?

A. That is a book entitled "The Affairs of the Trou-
[fol. 15] bador." It has my initials, "M.H.", the date "5-23-57." It was one of the books found in the dresser drawer on this date.

Q. Showing you what has been identified as State's Exhibit 2, what can you tell us about that?

A. This book is entitled "Little Darlings," has my initials, and the date 5-23-57, inscribed on the second page, which was found at the residence of Mrs. Mapp May 23, 1957, in the dresser drawer.

Q. Showing you what has been identified as State's Exhibit 3, do you recognize it?

A. Yes, I do.

Q. And what is it?

A. That is a book entitled "London Stage Affairs," has my initials inscribed on the second page, date May 23, 1957. That is another of the books found in the dresser drawer at Mrs. Mapp's residence.

Q. Showing you what has been identified as State's Exhibit 4, do you recognize that?

A. Yes, I do.

Q. And that is what?

A. It is a book entitled "Memories of a Hotel Man," has my initials inscribed on the inner page, and date 5-23-57. That is the fourth of the four books found in the dresser drawer of Mrs. Mapp's residence, May 23, 1957.

Mrs. Mahon: Mark these.

[fol. 16] (Thereupon papers were marked by the reporter for identification State's Exhibits 5, 6, 7, 8, 9, respectively.)

Q. Officer, showing you what has been identified as State's Exhibit 5, what can you tell us about that?

A. That is a piece of paper with some obscene drawings on it in pencil. My initials are inscribed on the lower right hand corner, which was found in the suit case beside the bed in Mrs. Mapp's room May 23, 1957.

Q. I believe you testified here you found other personal papers in that suit case?

A. Yes, photos and personal papers in the suit case.

Q. Showing you what is identified as State's Exhibit 6, officer, do you recognize that?

A. Yes, I do.

Q. And what is it?

A. It is a diet slip; patient, Mrs. Mapp, date June 9, 1956. That was found in the same suit case the other picture was found in.

Q. This was found in the suit case along with that picture?

A. Yes.

Q. Showing you what is identified as State's Exhibit 7, do you recognize that?

A. Yes, I do. That is an affidavit found in the same suit case along with the diet slip and the picture, the drawing.

[fol. 17] Q. And State's Exhibit 8, do you recognize that?

A. Yes, I do.

Q. And what is it?

A. It is a picture of Mrs. Mapp and two other persons in a folder from the Chatterbox Musical Bar and Grill, found in the same suit case with the other exhibits.

Q. Showing you State's Exhibit 9, what is that, officer?

A. That is also a picture of Mrs. Mapp and the same two persons in State's Exhibit 8, in a folder of the Chatterbox Musical Bar. That was also found in the suit case.

Q. Along with the picture?

A. Along with the picture, yes.

Q. Do you know, officer, of your own knowledge, how long Mrs. Mapp had lived at that address?

A. I am not certain how long she lived there.

Q. Did you have any conversation about that?

A. We had questioned her who owned the home; she stated that she did, that she had moved to New York for a short time, and had leased the house, and upon her return had lived on Lee Road for a short time, and then returned to her own residence on Milverton. I don't know exactly how long she had been back there.

Mrs. Mahon: Mark these.

(Thereupon photographs were marked by the reporter for identification State's Exhibits 10, 11, 12, 13, respectively.)

[fol. 18] Q. Officer, I am showing you what is identified as State's Exhibit 11. Do you recognize that?

A. Yes, I do.

Q. What can you tell us about it?

A. That is the obscene photo that was found in the chest of drawers by Sergeant Delau, at Mrs. Mapp's residence on Milverton Road; it has my initials inscribed in the corner.

Q. Showing you what is identified as State's Exhibit 10. Do you recognize that?

A. Yes, I do.

Q. And what is it?

A. That is also the group of obscene pictures, or one group, and has my initials in the corner, dated 5-23-57, one of the four which was found in the chest of drawers in Mrs. Mapp's home by Sergeant Delau.

Q. I show you what is identified as State's Exhibit 12. What is that?

A. This is also a group of obscene pictures, one of the four which was found in the chest of drawers in Mrs. Mapp's dresser by Sergeant Delau, May 23, 1957; it has my initials down in the corner.

Q. I show you what is identified as State's Exhibit 13. What is that?

A. That is a group of obscene pictures, and one of the group found in the chest of drawers, along with the three [fol. 19] others, by Sergeant Delau, May 23, 1957, in Mrs. Mapp's bedroom; it has my initials on in the corner.

Mrs. Mahon: I believe that is all.

Cross examination of Michael Haney.

By Mr. Kearns:

Q. Officer Haney, who was the person that you went out there to try to find?

A. We didn't know who the party would be at that address.

Q. You testified you received confidential information that somebody involved in a bombing would be found at that address?

A. Our information was somebody was wanted for bombing in the home, found in the home. We were not told ahead of time who the particular person was, other than it was a man for questioning wanted in the bombing.

Q. Who went out with you?

A. Sergeant Delau and patrolman Thomas Dever.

Q. After you arrived there the lady defendant here said through the window she would call her lawyer to see whether you should be admitted to search without a search warrant; is that right?

A. That's right.

Q. And to your knowledge, as far as you know, she did call me?

A. As far as I know; yes, sir.

Q. Well, didn't one of my assistants get out there, Mr. Walter Green?

[fol. 20] A. Yes, Mr. Green arrived after the lieutenant had gotten there. The search warrant arrived in approximately two hours after we originally got there.

Q. And you did procure a search warrant?

A. I did not, no.

Q. Well, some of the officers?

A. That's right.

Q. But when the search was made there were more officers than you and Sergeant Delau and patrolman Dever that were there?

A. That's right.

Q. How many all together?

A. There was Sergeant Delau, patrolman Dever, Lieutenant White come with a search warrant; Inspector Barrett of the fourth district was there; the captain was there; it could be the captain was there; I am not certain.

Q. Who else?

A. There was a patrolman from one of the zone cars there.

Q. That is seven?

A. Yes.

Q. Four beside the three of you that you counted, you and the sergeant and patrolman Dever?

A. That's right.

Q. Who was the inspector that came?

A. Carl Barrett, in charge of the fourth district.

Q. Any other police officers there at the time this place [fol. 21] was entered and search was being made?

A. Not tha I recall.

Q. Well, do you know what the other police officers were doing besides you and the sergeant that were upstairs in the bedroom?

A. I didn't see what they were doing.

Q. You know what they were doing?

A. Some was searching the basement, yes.

Q. Now, officer, you are speaking of a suitcase in which you found some of these items that have been shown to you; weren't there other things found in the suitcase?

A. There was a photo album, and other obscene pictures which were there, yes.

Q. Did you yourself make a search of the suitcase?

A. Yes, I did.

Q. But you didn't search the dresser drawers?

A. I did search the dresser drawers on the far wall, yes.

Q. Did the sergeant do some searching in the drawers in that room?

A. Yes, the chest of drawers.

Q. Didn't he find anything?

A. He found the four pictures which were presented in evidence here.

Q. And then he brought them out and handed them to you?

A. Yes, he did; he showed them to me and handed them to me.

Q. In other words, you didn't find them, you were present. [fol. 22] Did you know as to where they came from, that is, what the sergeant gave to you?

A. I was in the room when the sergeant found them.

Q. You know you were in the room. Were you looking at them at the time he pulled them out of the drawer?

A. No, I was not.

Q. So that all you know as to where they actually came from, from your own personal knowledge, is what the sergeant told you when he handed them to you?

A. The sergeant searching the drawer turned around and said "Here."

Q. His back was to you when he was searching the drawer?

A. Yes.

Q. So you didn't see him take them out of the drawer, is that right?

A. That's right.

Q. Now in the suitcase wasn't there other things besides the photograph you spoke of, the album,—wasn't there a man's shirt in that suitcase?

A. No, there was not.

Q. Wasn't there anything pertaining to men's clothing in the suitcase?

A. No, sir.

Q. Nothing?

A. Nothing.

[fol. 23] Q. Did you talk to Mrs. Mapp about that particular suitcase, as to who it belonged to?

A. Yes, we did.

Q. And she told you it belonged to her?

A. Yes, she did.

Q. What else, if anything, did she tell you?

A. Nothing.

Q. Didn't she tell you she had loaned the suitcase to Morris Jones, to put some of his things in there?

A. No, she did not.

Q. Isn't it a fact you found a gun in that suitcase?

A. I did not.

Q. Wasn't there a gun in that suitcase?

A. No, there was not.

Q. I will hand you here a standard text book of Cosmetology, and ask you if that wasn't in the suitcase?

A. If it was in there I didn't see it.

Q. Isn't it a matter of fact you took that book out and said you weren't going to take it along, it wasn't necessary,—isn't that a fact?

A. No, it is not.

Q. Isn't it a fact you said about the album, the pictures that you spoke of, that you said that wasn't necessary to take along?

[fol. 24] A. The album of pictures was put back in the suitcase.

Q. But you saw the albums of pictures of Mrs. Mapp, didn't you?

A. Most of them were, yes.

Q. Yes, and you brought other things with her name on it. Why didn't you bring the album out to show that was all in the suitcase?

A. I felt her statement it was her suitcase and the pictures were there, I didn't need any more.

Q. You didn't even need the suitcase itself?

A. No.

Q. And you say there wasn't a gun in the suitcase?

A. No, there wasn't.

Q. Isn't it a fact you asked her whose gun that was?

A. No.

Q. Isn't it a fact she said it belonged to Morris Jones?

A. No, that is not a fact.

Q. Isn't it a fact you asked her who this standard text book of Cosmetology belonged to?

A. No, it is not.

Q. And isn't it a fact that you saw the name on the book itself, "Morris Jones," and that is the reason you refused to take it?

A. That is not a fact.

Q. Now you say that the State's Exhibit 6, which is a diet of Mrs. Mapp's, that was in the suitcase?

[fol. 25] A. That was in the suitcase; yes, sir.

Q. Did you yourself find it in that suitcase?

A. Yes, I did.

Q. Did anybody search the desk in the living room?

A. I don't know whether they did or not.

Q. Didn't you?

A. No, I didn't.

Q. And isn't it a fact that that diet was not found in the suitcase but in the drawer of the desk in the living room?

A. No, it is not a fact; it was found in the suitcase.

Q. Now, officer, I want you to tell this jury, isn't it a fact that some obscene matters were found in a box in the basement where the lottery slips were found?

A. Not to my knowledge. Anything they found and presented here was found in the bedroom.

Q. Didn't you learn that some things were found in the box?

A. Nothing obscene; there was no box found other than the trunk, the policy paraphernalia.

Q. That was in the basement, wasn't it?

A. Yes.

Q. And in the box where that policy paraphernalia was found, was a small brown box with most of this evidence that you have introduced here and state you found; isn't that true, to your knowledge?

Mrs. Mahon: Objection.

[fol. 26] The Court: He may answer.

A. That is not true.

Q. Now, you did find lottery paraphernalia in the basement, didn't you?

A. I didn't, but there was some found; yes, sir.

Q. Some of the seven police officers that made a search found it; is that right?

A. That's right.

Q. And you or no one in the police department ever charged Mrs. Mapp with any possession of any of this policy paraphernalia, did you?

A. Mrs. Mapp was charged with policy paraphernalia in police court.

Q. She was?

A. She was; she was tried.

Q. As a result of this search?

A. Yes, sir.

Q. You mean as a misdemeanor?

A. As a misdemeanor; yes, sir.

Q. To your knowledge, Mr. Green from my office, at the time the search was made, was not permitted inside of the house to watch the search, or what was being done; he was kept outside of the house?

Mrs. Mahon: I am objecting to the form of the question.

[fol. 27] The Court: Yes, you made a statement.

Mr. Kearns: I said "To your knowledge."

The Court: Whether or not that is a fact. Can you answer?

A. Mr. Green remained outside with me. Whether he was kept out or remained out, I couldn't say, because I was outside when Mr. Green went to the house to gain admission.

Q. And you don't know one of the uniformed officers, whether it was the lieutenant or captain, told him he should not go in; do you know that as a fact?

A. I don't know who told him; I don't know whether somebody did; all I know I stayed outside and Mr. Green also remained outside.

Q. Isn't it a fact Mr. Green tried to get in the front door and was refused admission, and he tried to get in the side door and was refused admission by the same officer?

A. I don't know whether he was refused or not; I know he remained outside with me, but I don't know whether he was refused admission.

Q. Now you say Mrs. Mapp was charged with possession of these policy slips and policy paraphernalia?

A. Yes, sir.

Q. And was discharged in the court, wasn't she?

A. Yes, she was.

Mr. Kearns: That's all.

* * * * * * *

[fol. 28] Recross examination of Michael Haney.

By Mr. Kearns:

Q. Officer, isn't it a fact all of the police officers at one time or another were inside of that house?

A. I don't know if they were all in or not.

Q. Most of them were?

A. Most of them, yes, were in the house.

• • • • • • •

[fol. 29] Q. Officer, isn't it a fact that Mrs. Mapp was handcuffed to one of the uniformed police officers while the search was going on?

A. Mrs. Mapp was handcuffed, but there was a uniformed officer there; I couldn't testify whether she was handcuffed to him or merely handcuffed.

• • • • • • •

[fol. 30] By Mr. Kearns:

Q. Where is that search warrant?

A. I don't know.

Q. Do you have it here?

A. I don't have it.

Q. Would you tell the jury who has it?

A. I can't tell the jury who has it; no, sir.

Q. And you were one of the investigating officers in the investigation by the police department?

A. Yes.

Q. But you can't tell us where the search warrant is?

A. No, I cannot.

Q. Or what it recites?

A. No.

• • • • • • •

[fol. 31] Q. You yourself did not obtain the search warrant, did you, officer?

A. No, I did not.

Q. Do you know who did?

A. I was told Lieutenant White obtained it.

• • • • • • •

[fol. 32] Thereupon the State, further to maintain the issues on its part to be maintained, called as a witness, CARL DELAU, who, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mrs. Mahon:

Q. Your name, please?
A. Carl Delau.
Q. What is your address?
A. 1063 Cove Avenue, Lakewood, Ohio.
Q. And you are a member of the Cleveland Police Department?
A. I am.
Q. And in what department are you employed, officer?
A. I am assigned to the Bureau of Special Investigation.
Q. You are a sergeant in the department, aren't you?
A. I am.
Q. How long have you been on the police force?
A. Twelve and a half years.
Q. During the course of your duties, officer, did you have occasion to go to the home of one Dollree Mapp on May 23rd last year?
A. Yes, I did.
Q. Were you alone at the time?
A. No, at that time I had patrolman Haney and patrolman Tom Dever with me.
[fol. 33] Q. About what time did you get there?
A. Got there shortly after one o'clock p.m., in the afternoon.
Q. That is the Dolly Mapp who is sitting in the courtroom?
A. Seated at the table, yes.
Q. Did you know her by any other name?
A. Dollree Mapp, Dollree Bivens. And just suspected—I'll skip that; there was another name with that she had gone by.

Mr. Kearns: May I ask the court to instruct the jury to disregard that last statement, of his suspicion.

The Court: Sustained; the last statement will be disregarded, ladies and gentlemen of the jury.

Q. Will you tell us, officer, what happened when you arrived at her home?

A. We arrived there approximately a little after one p.m. —well, first we went by the home shortly after one p.m., when we seen her car in the drive; we went down the street, parked down the street, made observation until approximately one-thirty; no one had left; at one-thirty that date we went to the brick home, two floors, two families, one on each floor; we attempted to gain entrance, rang the side door bell, when Mrs. Mapp put her head out the window and asked what we wanted; we said we wanted to search the house, that we had information there was evidence in there [fol. 34] which we desired. At that time she said she wouldn't let us in, but would make a phone call; she left and came back and said she spoke to her attorney and her attorney told her not to let us in. At that time we left the scene and I called Mr. Cooney and told him we were unable to gain entrance. He said to remain on the scene and he will talk to her; he did speak to her on the phone and asked her to open the door.

Mr. Kearns: Object.

The Court: Sustained.

Mrs. Mahon: Don't relate the conversation.

A. (continuing) Close to four p.m. that afternoon Lieutenant White arrived on the scene with a search warrant. When we told her we had a search warrant she opened the door. Before that she said she wouldn't; at that time we did pry the screen door to gain entrance to the building itself. We went upstairs, myself and Lieutenant White; Inspector Barrett had arrived on the scene. She demanded to see the warrant; that is when she grabbed it out of his hand and concealed it on her person. We recovered the warrant, and she was quite belligerent at the particular time. So I told her we were going to search her apartment on the second floor. Patrolman Dever came upstairs briefly, and he went down to search the basement; he come from outside where he had remained and come upstairs with me. Patrol- [fol. 35] man Haney, a uniformed policeman who was on

the scene, and myself, searched Mrs. Mapp's bedroom. There are two bedrooms in the rear, hers is on the right. At that time she remained seated on the bed, remained in the bedroom while I was searching the bedroom.

Q. She was present?

A. She was in my presence during the complete search of the bedroom. It was at that time I was searching the chest of drawers and found four photographs, which have been entered in as evidence; and in the chest of drawers I found a 25 caliber Colt automatic gun.

Q. Where did you find that?

A. It was in the chest of drawers which I had searched. I found a lot of other stuff, tape recorders and such, confiscated that outfit that was in the chest of drawers there.

Q. In her bedroom?

A. In her bedroom. I was in that bedroom when patrolman Haney found the four books which have been introduced as evidence, in the dresser that he was searching. As soon as he had found them he showed me what he had found.

Mr. Kearns: I ask at this time the testimony patrolman Haney found these be stricken from the record because it is hearsay. He said the police officer showed them to him and told him where he had found them.

[fol. 36] The Court: Were you in the room at that time?

The Witness: I was in the room at that time, yes.

The Court: Did you observe what he was doing?

The Witness: I wasn't watching him completely all the time, no. He had them in his hand and said, "Look what I found."

The Court: The testimony may stand; his conclusion as to the finding will be stricken, but the observation may stand.

Mr. Kearns: He just said patrolman Haney told him he had found it, "Look what I found."

The Court: He may testify as to what took place at that time.

Q. Was the defendant present while this conversation went on between you?

A. Yes, she was.

Q. What size bedroom was this, officer?

A. It was a normal size bedroom; I'll say probably twelve by twelve, perhaps eleven by twelve; it wasn't too large; it contained a bed, chest of drawers and the dresser, and there is a closet for this particular bedroom.

The Court: We will have to stop here for lunch. So we will adjourn for lunch, ladies and gentlemen. I charge you while you are absent from the courtroom not to have [fol. 37] any conversation about this matter with anyone, and above all draw no conclusions in your own minds until you have heard the whole case and received the evidence and the charge of the court. Have no contacts of any sort; and permit no one to talk to you, and you are not to contact them. You will return from lunch and be ready to proceed at one-thirty. You may leave the courtroom.

Thereupon the court adjourned until 1:30 p.m.

Trial resumed, pursuant to adjournment, at one-thirty p.m.

Thereupon the witness, CARL DELAU, resumed the witness stand for further direct examination, and was examined and testified as follows:

Direct examination.

By Mrs. Mahon:

Q. Officer, I believe you testified you found a gun in that bedroom?

A. Yes, I did.

Q. Where was that?

A. That was in the one dresser I was searching where I found four pictures.

[fol. 38] Q. Did you have any conversation with this defendant concerning that gun?

A. I asked her who it belonged to; she just said it was in there, didn't say to who it belonged.

Q. You did observe that suitcase that was in the bedroom?

A. Yes, I had.

Q. And will you state whether or not it was a man's or woman's suitcase?

A. It appeared to me to be—

Mr. Kearns: I object.
The Court: Sustained.

Q. Officer, did you have any conversation with the defendant concerning that suitcase?

A. Yes, in company with patrolman Haney.

Q. And what did she say about it?

A. She said it was her suitcase at that time. This was on the premises in the bedroom.

Q. Did you make any further examination of the clothes closet in that suite?

A. In the both bedrooms I did.

Q. What did you find?

A. The bedroom where we found the confiscated evidence had nothing but feminine wearing apparel and other clothing, and women's personal things, adult woman, grownup [fol. 39] clothing; and there was no men's clothing at all in that particular bedroom. The second bedroom contained children's clothing; and we questioned the defendant, and she said that was her daughter's bedroom, and we found nothing in there but clothing for a young girl.

Q. Did you search any other rooms in that suite?

A. I searched the entire second floor.

Q. You did?

A. Yes, I did.

Q. What did you find, if anything?

A. Other than in the one bedroom, I searched that bedroom, searched the daughter's bedroom, searched the kitchen, the living room, with small dinette in the rear of it. We found nothing else other than just some policy books, blank policy books.

Q. Where did you find them?

Mr. Kearns: May I object, if the court please?
The Court: Does that have any bearing on the issue?
Mrs. Mahon: Just to show—
The Court: I will sustain it.

Q. Officer, did you search the basement of that home?

Mr. Kearns: Object to leading the witness. Let him tell. [fol. 40] The Court: Well, he may tell. Have you told where you did search?

A. I searched the basement also.

The Court: That may stand.

Q. Did any other police officers besides patrolman Haney and your partner Dever, help you in this search that you made?

A. The other policemen were on the premises, but they did not assist in the search at all.

Q. They didn't?

A. No.

Q. Did you find anything in the basement?

A. Yes, I did.

Q. What did you find?

A. I will qualify that. My partner found a foot locker, quite a large foot locker, and it contained policy paraphernalia in the foot locker.

Q. That was in the basement?

A. Yes.

Q. Anything else in the basement?

A. No, other than the usual things found in the basement, that was the only thing which we were interested in.

Q. Officer, did you have any conversation with this defendant concerning what you found in her bedroom?

A. I had a conversation with her, yes.

[fol. 41] Q. What was the conversation?

A. In the bedroom itself, when we found those items she wouldn't say anything as to what they were doing there, what the confiscated evidence was doing in her bedroom, other than making the only explanation which I overheard her say to patrolman Haney he would be excited to see them, she wouldn't comment on those things. After we brought her down to Central Station we questioned her again, and it was there she said those books were left behind by Morris Jones, who had lived with her before that and who had roomed at her home on Milverton Road.

Q. Did you have any further conversation with her at any later time as to those books?

A. No, other than in the station and when she gave a statement the following day, we had no conversation with her, and she said those books were left behind by this roomer she had.

Q. Officer, I am showing you what has been identified as State's Exhibit 10. Will you tell us if you recognize that?

A. Yes, I do.

Q. Will you explain where you saw that before?

A. This photograph was found in the chest of drawers by myself, in the bedroom of Mrs. Mapp at the residence at Milverton on May 23rd.

Q. And that was found by you?

[fol. 42] A. That was found by myself.

Q. Showing you State's Exhibit 11, will you tell us what you know about that?

A. This is another photograph which I found in the bedroom of Mrs. Mapp, at the residence on Milverton Road.

Q. Showing you State's Exhibit 12, will you explain that exhibit?

A. This is another photograph which I found, one of the four, in the drawer in Mrs. Mapp's bedroom.

Q. Showing you State's Exhibit 13, will you explain that one?

A. This is one of the four photographs I found in Mrs. Mapp's bedroom at Milverton Road, May 23rd.

Mrs. Mahon: That's all.

Cross examination of Carl Delau.

By Mr. Kearns:

Q. Sergeant Delau, you went out to the residence of Mrs. Mapp with whom?

A. Patrolman Haney and patrolman Dever.

Q. You say that you have known Mrs. Mapp for some time, is that correct?

A. I probably have known her for four or five years.

Q. And you have known that her name is Dollree Mapp, isn't that right?

A. One of her names; also Dollree and Dolly.

Q. You had her charged in this case as Dolly?

[fol. 43] A. She is also known as Dolly.

Q. But you did know that her right name was Dollree Mapp?

A. I did not know what her right name was.

Q. Well, you knew her name was Bivens at one time?

A. Yes, I did.

Q. And that is by reason of the fact that she was the wife of the prize fighter Bivens, is that correct?

A. That is correct.

Q. Now, after you went to this home which, by the way, is a private home in the city of Cleveland, isn't it?

A. Yes, it is.

Q. And after you called Mrs. Mapp's attention to the fact that you wanted to go in, she told you through the window she would call her lawyer and see if it is okay, is that correct?

A. That is correct.

Q. And after a little time passed she then came down to open the door for you, didn't she?

A. No, she did not.

Q. Well, as a matter of fact she told you then that she had talked to her lawyer, and asked you if you had a search warrant?

A. Yes, she did.

Q. And you said no, but we can get one?

A. That is correct.

[fol. 44] Q. And then she told you that you better get a search warrant, then you could go into her house?

A. Correct.

Q. And it was then that you called Lieutenant White and told him you were having trouble getting in, and she insists on a search warrant?

A. I didn't call White; I called Lieutenant Cooney, my boss.

Q. Then sometime later when you and the other two police officers were on the scene, someone came out with a search warrant, didn't they?

A. That is correct.

Q. And who was it?

A. That was Lieutenant White.

Q. Lieutenant White came with a search warrant?

A. Yes.

Q. By that time Mr. Walter Green, of my office, was also there, wasn't he?

A. He arrived a few minutes after that.

Q. How many police officers all together were there beside the three of you at the time that you entered this home?

A. On the scene there were seven.

Q. All together?

A. Yes.

Q. Some of them were in uniform, weren't they?

[fol. 45] A. Three were in uniform.

Q. And was there a captain there too?

A. No, there wasn't.

Q. Just the lieutenant?

A. Two lieutenants.

Q. Who was the other lieutenant?

A. Lieutenant Halleron, fourth district. He had that particular area there.

Q. Was he in uniform?

A. Yes.

Q. And Lieutenant White, was he in uniform?

A. In civilian dress.

Q. Then there was an inspector there too?

A. Yes.

Q. Was he in uniform?

A. Civilian dress.

Q. And there were only three police officers in uniform?

A. I will have to retract that. I think two, Lieutenant Halleron and a patrolman

Q. Was this the patrolman from that particular district, the zone car, or something?

A. I believe he was the patrolman of that zone where the house is.

Q. Think back. Wasn't there four police officers in uniform?

A. I am quite sure there were only two.

[fol. 46] Q. Only two?

A. Yes.

Q. Who remained outside to keep others from going in?

A. The only person I told to remain outside—and I don't think it was for the purpose of keeping others out, but I told Haney t remain outside to make sure nobody threw anything out the window.

Q. Was there anyone else outside in uniform?

A. The other patrolman.

Q. As a matter of fact, wasn't there a lieutenant outside?

A. I don't know. He doesn't work for me and I don't work for him.

Q. I am just asking what you know and what you saw.

A. Possibly he could have been outside.

Q. Isn't it a fact it was the lieutenant in uniform that refused Mr. Green the right to go into the premises, to your knowledge?

Mrs. Mahon: I object.

A. I do not know.

Q. You don't know that?

A. I don't.

Q. But you do know Mr. Green wasn't permitted to enter the premises while you folks were making the search?

A. I do not know that either.

Q. Well do you or don't you know whether he did enter [fol. 47] the premises at all?

A. I did not see him inside with us.

Q. How many officers did you see inside?

A. The seven I mentioned, and eventually all were inside.

Q. And during all that period of time Mr. Green was not inside, to your knowledge?

A. Not to my knowledge.

Q. Well, when you left the premises wasn't he still there?

A. I don't know where he was; I wasn't interested in Mr. Green.

Q. Yes, but you didn't see him?

A. I did not.

Q. Now you say that the other officers were there, but no one searched except you and your two men?

A. To my knowledge-I told patrolman Haney to search in the bedroom with me; patrolman Dever searched the basement. The other officers with him I did not see them searching.

Q. You are in the investigation department of the Cleveland Police Department; you were there for a specific purpose; can't you tell this jury whether the other officers that entered the place, as you say, made any searches at all?

A. I did not see them search.

Q. Whether you saw them or not, weren't there reports made to your department as the investigation department?

Mrs. Mahon: Objection.

[fol. 48] Q. By the other officers, to your knowledge?

The Court: He may answer.

A. The other officers played no part at all in the searching of the building. It was our investigation, they were there, but they did not assist me, and I have no knowledge of them searching.

Q. And if they did search you don't know anything about it?

A. They may have and I don't know about it; that could be so.

Q. But to your knowledge, at one time all of the officers were inside of that house?

A. Yes, they were.

Q. And when you talked to the defendant she did tell you that these things that you were showing her were left behind by the man that roomed there, Morris Jones?

A. Yes, she did tell me that.

Q. And all this happened in July of 1957?

Mrs. Mahon: Objection.

The Court: Sustained.

Q. Is this true, that your search was made and these things introduced in evidence was on the 23rd of July, 1957?

Mrs. Mahon: You have it wrong, the date.

Mr. Kearns: Of May. I beg your pardon.

Q. On May 23rd of 1957?

A. That is correct.

[fol. 49] Q. Did you give any one of your police officers instructions to keep Mr. Green out of the premises while you were searching?

A. I did not.

Q. Do you know anyone else who did give such orders, the inspector or the lieutenants?

A. I did not hear anyone pass out instructions.

Q. Whether you heard it or not, do you know whether any of them did?

A. I do not know.

Q. But in the basement of this residence you did find a large foot locker?

A. Patrolman Dever found it and called it to my attention; that is correct.

Q. Do you know how long before he found it that your attention was called to it?

The Court: What's that?

Q. How long before your attention was called to it had he found it?

A. To my knowledge it was a matter of a few minutes. He came up and said, "Sergeant, I want to show you what I found down in the basement." And I went down in the basement with him.

Q. And these things were confiscated by your department and taken to headquarters?

A. Yes, they were.

[fol. 50] Q. And that was a large foot locker, is that right?

A. That is correct.

Q. Have any name on it, any identification on it?

A. No, there was no name on it.

Q. Well, was there any material in it that you could identify as belonging to Morris Jones?

A. There was not.

Mr. Kearns: I think that is all, your honor.

The Court: Anything else?

* * * * * * *

[fol. 53] Defense

Whereupon the defendant, to maintain the issues on her part to be maintained, called as a witness, WALTER GREEN, who, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearns:

Q. Will you tell the court and jury your full name?

A. Walter Green.

Q. And your address?

A. 4394 Silsby Road, University Heights.

Q. What is your profession?

A. I am an attorney.

Q. Where is your law office?

A. 1101 Hippodrome Building.

Q. And who are you associated with?

A. With yourself and my father.

Q. On or about the 23rd day of May, 1957, do you recall a telephone call that you had with Mrs. Dollree Mapp?

A. Yes, I do.

Q. And how long have you known Mrs. Dollree Mapp?

A. I estimate it a couple of years.

Q. During that period of time have you spoken to her quite frequently?

[fol. 54] A. Many times.

Q. Have you spoken to her on the telephone?

A. Many times.

Q. And are we now handling a civil lawsuit for her?

A. Yes, we are.

Q. And have we been handling that civil lawsuit for over two and a half years?

A. Well, as long as I have known her we have been handling this matter for her.

Q. And do you know that she was the person on the telephone that you talked to?

A. She so identified herself, and I recognized her voice.

Q. What did she say to you?

A. The exact words I can't repeat, but it was to the effect that the police had her house surrounded, and they wanted to gain admission, and should she let them in.

Q. What advice did you give her?

A. I said, "If they can produce a warrant, and show you that warrant, let you read it to see it is in proper order, then let them in."

Q. Did you hear any more from her on that day?

A. Well, there were two, possibly three telephone calls on that particular date from Mrs. Mapp.

Q. To you?

A. To me. Well, originally she called you; I believe you [fol. 55] were in court at the time when I took the call.

Q. Now what did you do after the telephone conversations, if anything, pertaining to her residence?

A. Well, eventually I went out to the residence at her request.

Q. And will you describe to his honor, Judge Lybarger and this jury what you saw there with reference to the action and activity?

A. Well, Mrs. Mapp lives on Milverton—the address I don't know—140th and Milverton; as I drove up I saw several police cars and what appeared to me policemen all over the place.

Q. At this time can you give this jury some idea of how many policemen you saw, as you say, all over the place?

A. My estimate at this time would be ten to fifteen officers.

Q. And were there men in uniform?

A. Yes, there were.

Q. Can you give this jury some idea, approximately, how many men in uniform were there, to your best recollection?

A. Well, I would say half to two-thirds of the men present were in uniform.

Q. What happened from then on?

A. Well, it was difficult finding a parking place right in front of the house, and I pulled up possibly a house or two beyond hers. As I walked back a couple of officers started to walk towards me, then they turned around and walked back, and I saw Sergeant Delau, I believe, attempting to [fol. 56] kick in the door.

Q. Is this the gentleman sitting in the courtroom?

A. Yes, the second officer, and I think I—I believe I stopped and asked him what they were doing; he said they wanted to get in. I asked if they had a warrant, if they had a search warrant it wasn't necessary, just show it to Mrs. Mapp. He said he had a warrant; they refused to show it to anybody: I never did see a warrant.

Q. Go ahead and tell it to the court, what happened.

A. The sergeant tried, as I say, to kick in the door, and she wouldn't come down. Then he got a sharp instrument—I mean a metallic instrument; I don't know what it was—and broke the glass in the door and somebody reached in and

opened the door and let them in. Inspector Behr was there at the time, and had plainclothes men; I don't know how many men walked in ahead or behind. I started to walk in somewhere behind Inspector Behr, and he instructed the uniformed captain to keep me from entering the premises. As I recall now the captain opened his tunic, and I got a glimpse of a revolver that he had on his belt. I didn't go any further; I asked him to let me in several times, and several times Inspector Behr came to the door and notified me I would not be allowed to walk in the premises. I walked to the front door and the side door, and I didn't gain access to the premises.

Q. You spoke of inspector Behr. Could that have been Barrett?

[fol. 57] A. I think it was Behr, an inspector.

Q. He was an inspector of police, to your knowledge?

A. To my knowledge.

Q. And you did not gain entrance to the place at all?

A. No, sir.

Q. Give this jury some idea of approximately how long these people were in these premises—I mean the police officers—and before they left.

A. My best recollection at this time would be about an hour from the time I got there.

Q. Then what did you do?

A. As I say, I walked from door to door, yelled in, asked the inspector to let me in to observe what was going on. Either I got no answer, or if I got an answer I wasn't going to be admitted. There were policemen walking up and down, up and down. I heard some loud talking.

Q. When you speak of walking up and down, will you tell this jury walking up and down where?

A. Well, there is a front stairway—there is a stairway directly to the left of the front door as you walk in. I stood there and policemen were walking up and down to and from Mrs. Mapp's apartment, which is on the second floor; there was another lower apartment on the first floor. They would walk up and down; I assume they went into the basement; I don't know. As I say, there was a great deal of commo-

[fol. 58] tion and loud talk, and I heard Mrs. Mapp call out several times.

Q. Did you hear what she said?

A. One time she said "Take your hand out of my dress."

Q. What else do you recall? Did you get any chance to see her, see whether or not she was handcuffed?

A. No, I didn't see her until they took her out. At the time I heard this particular statement I was standing at the front door, which was somewhere on those steps; from the direction of the voice, the volume of the voice, I deduced she was somewhere on the steps.

Q. Then when they took her out will you describe whether or not she was wearing handcuffs or not?

A. I can't say, Mr. Kearns; I don't recall. I know they took her to the police car; Sergeant Delau got in the back with her.

Q. What did the other police officers do?

A. Eventually they all vacated the house; I don't know who went downtown in cars; I know they eventually went down; I believe they took a trunk out of the house; where they got it I don't know. I followed them in my car.

Q. Where did you follow them?

A. Central police station.

Q. Did you stop at Central Police station?

A. Yes. I believe I saw Mrs. Mapp there.

Q. Did you talk to her?

A. Yes, I believe I did.

[fol. 59] Q. And what did they do with her?

A. Well, she was detained in jail; I don't know what they did to her.

Q. What did you do?

A. I believe I arranged bail for her.

Mr. Kearns: You may inquire.

Cross examination of Walter Green.

By Mrs. Mahon:

Q. Mr. Green, you are an associate of Al Kearns? You are partners in the law business?

A. Yes.

Q. You have an office with him?

A. Yes ma'am.

Q. So that you are very close friends, aren't you?

A. Yes.

Q. When you went out to that house you weren't trying to prevent the police from making a lawful search, were you?

A. I wasn't trying to prevent them from doing anything; I simply wanted to observe what they were doing to Mrs. Mapp. She was terrified and asked that I come out.

Q. Just answer my questions. You are a lawyer, aren't you?

A. Yes.

Q. When you got out there you took a lot of pictures, didn't you?

A. No.

Q. You didn't take any pictures?

[fol. 60] Q. You took three of the house there?

A. The sergeant's foot against the door.

Q. Do you have that picture?

A. They didn't come out.

Q. You didn't get his foot?

A. No; it was a little camera I frequently carry; I guess in the excitement I didn't pull the film through; they didn't come out.

Q. Where were you standing when you took that picture?

A. I was standing, I would say, about two yards away from that side door, next to Mr. Haney's—

Q. What other pictures did you take?

A. I tried to take pictures of the people as they were being taken away, but I was kind of shooting from the hip, not looking through the camera; got a bunch of trees and scenes like that.

Q. You didn't get any pictures?

A. Just trees and scenes, and the double exposure of the sergeant.

Q. You are not good with a camera at all.

A. Not at that time.

Q. You were with patrolman Haney outside of the house?

A. Yes, ma'am.

Q. That is this officer here?

A. Yes, ma'am.

Q. And patrolman Haney never told you that you couldn't [fol. 61] go into that house, did he?

A. I don't know whether—I wouldn't say he didn't; I don't know; I don't recall.

Q. And he was the only officer you were talking to?

A. Oh, no.

Q. That is when you arrived at the home?

A. When I arrived at the home several of the officers started to move towards me, because I didn't know any of them at that time. As a matter of fact, it was only later that I learned their names; and, as I say, I stood there and watched the sergeant attempt to break in the door. They saw I had a camera; officer Haney said, "He's got a camera, he's got a camera." Then he threatened me.

Q. Who do you mean by "he"?

A. Officer Haney. He told me I was invading his privacy, he was going to do something about it. I explained my legal rights.

Q. Just answer my question. You say you don't recall Haney never told you to go into the house?

A. I wouldn't say.

Q. Don't you remember Haney telling you that you would have to answer to the police if you go in?

A. That I couldn't say.

Q. What officer did you ask?

A. I spoke directly to inspector Behr. As I say, the first [fol. 62] man who stopped me was a captain, uniformed captain.

Q. Now your interest in this case here is because you represent this defendant in a civil lawsuit?

A. There is no connection between the two.

Q. You testified that you have a civil lawsuit for her against a man by the name of Archie Moore?

A. I didn't specify to that at all.

Q. You didn't?

A. No.

Q. Is that civil lawsuit against Archie Moore?

Mr. Kearns: If the court please, I will object to that.

Mrs. Mahon: He brought it out.

Mr. Kearns: All I said is we know her because of a civil lawsuit.

The Court: He may answer that. It was brought out by the defense.

Q. What is that lawsuit about?

Mr. Kearns: Object.
The Court: Sustained.

Q. Dollree Mapp, this defendant, is suing Archie Moore?
A. Yes.
Q. Are you handling the case for her?
A. Mr. Kearns.
Q. Do you know who Archie Moore is?

[fol. 63] Mr. Kearns: I object. Where is that material?
The Court: Overruled; he may answer: Do you?

A. Yes, I know Archie.
Q. Who is he?

Mr. Kearns: Object.
The Court: Overruled.

A. He is a boxer.
Q. The Archie Moore known as the champion light weight boxer?

Mr. Kearns: Objection.
The Court: Objection sustained.

Q. How much are you suing for?

Mr. Kearns: Object.
The Court: Sustained.

Q. While you were out there, Mr. Green, did you observe somebody being taken away from there?
A. Yes.
Q. Do you know who it was?
A. There were two people.
Q. Do you know who they were?
A. I know, of course, Mrs. Mapp, and I later learned the other was Virgil Ogletree. I saw him the first time in the downstairs suite.
Q. On the first floor suite?
A. Yes, ma'am.

Q. And he was taken away in a patrol wagon?

[fol. 64] A. That would be my best recollection.

Q. You testified here one time while you were out there you heard her say, "Take your hand out of my dress"; is that right?

A. Something to that effect.

Q. Did you know, Mr. Green, that she had taken the search warrant away and shoved it down her bosom at that time?

A. I didn't know there was a search warrant, because I haven't seen it to this day; I asked them for it.

Q. You don't know why she said that, do you?

A. No, I haven't the slightest idea.

Q. Did you know she tussled with Lieutenant White when he tried to serve her with a search warrant?

A. I don't know Lieutenant White.

Q. You didn't know he was out there?

A. Well, I don't know; if you show him to me I will identify him.

Q. You had every opportunity to talk to this defendant when she was in the police station, didn't you?

A. If I am not mistaken, the—

Q. Please answer my question.

A. I don't think I had every opportunity. If I am not mistaken, officer Haney and another officer were in close proximity, and they permitted me to talk to her privately for a few minutes at a distance, not in a private room they have down the corridor.

[fol. 65] Q. Did you ask them for a private room?

Mr. Kearns: Object.

The Court: Overruled.

A. I don't know whether I did or didn't.

Q. You weren't prevented in any way from talking to her at the police station?

A. That wasn't your original question.

Mr. Kearns: Object to that.

The Witness: Frankly, I don't see what bearing this has.

The Court: What was the question?

(Question read by the reporter.)

The Court: Overrule the objection.

A. No.

Q. You did have a conversation with her at the police station, didn't you?

Mr. Kearns: Object.

The Court: Overruled.

A. Yes.

Mrs. Mahon: That's all.

Mr. Kearns: That's all.

(Thereupon, after duly cautioning and instructing the jury, a short recess was had.)

[fol. 66] Thereupon the defendant, further to maintain the issues on her part to be maintained, called as a witness, Dolores Clark, who, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearns:

Q. Now, Mrs. Clark, will you please speak to the last lady on this jury, loud enough so that they will all hear you. Tell us what your full name is.

A. Dolores Clark.

Q. And where do you live?

A. 5608 Utica.

Q. Do you know Mrs. Dollree Mapp?

A. Yes.

Q. How long have you known her?

A. A long time.

Q. Can you give this jury some idea, how many years, approximately?

A. I first met her when she was married to Mr. Bivens.

Q. And that was approximately how long ago?

A. Thirteen, fourteen; thirteen years, probably; a long time.

Q. You and she have remained friends since?

A. Well, off and on, yes.

Q. Did you ever see me before today?

A. No.

Q. Did you ever see or speak to anyone in my office, or [fol. 67] connected with me in the law business before today?

A. No.

Q. Do you recall on or about the latter part of April or first part of May of 1957, whether or not you were at Dollree Mapp's house when certain things were done with reference to packing?

Mrs. Mahon: Objection. Leading question.

Mr. Kearns: I am trying to get her down to the point that we want instead of taking a lot of time.

The Court: Sustained.

Q. Do you recall being at the home where Dollree Mapp lives?

A. Yes.

Q. Where?

A. On Milverton Road.

Q. In 1957 did you visit her quite often?

A. Yes, I visited her.

Q. And do you recall at any time on or about the latter part of April or first part of May, 1957, helping her to any packing?

A. Yes.

Q. Will you tell this jury in your own language what took place at that time when you helped her pack?

A. Well, I couldn't tell you all the details because it has been so long ago.

Q. Tell us what you remember of it.

The Court: Let's get set when this was. When did this [fol. 68] happen?

A. I can't say the exact date; it has been a long time ago.

Mrs. Mahon: I am objecting to the answer.

Q. Can you tell us approximately what month?

A. Say May.

Q. Will you tell us what took place?

A. I don't know the exact date, but she called me and asked what was I doing; I said nothing; she said "How

about coming out and straightening my room." Okay. When I got out there she said she needed someone to change the room, rearrange the furniture. When I got there she proceeded to pack some things,—clothing, saying she was going to clean the room out, pack the stuff before she rearranged the furniture. She said she had had a room rented out to a man. So when I got there she started to pack the stuff, pack the stuff in the box to take to the basement.

Q. What kind of clothes were they, ladies or men's clothes?

A. Men's clothes. A lot of junk, letters shoes, just general stuff, put them in (sic)

Q. You will have to speak a little louder.

A. When ~~we got~~ the stuff up off the floor and put it in the box, started to clean out the dresser drawers, and things like that. She was looking in the drawer, and all of a sudden she had this bag, a brown paper bag; she opened it up, she said, "Look what's in here." Then when she took [fol. 69] the stuff out of the bag it was a bunch of dirty books and some pictures.". She said, "Look at what filthy stuff men read." So we laughed it off, put it in the bag and put it with the man's stuff.

Q. You put it in the bag with th man's stuff?

A. Yes.

Q. And where, if you remember, did you take this bag eventually?

A. We took the whole box of junk down in the basement.

Q. Would you be able to identify the things that she showed you, if I show them to you?

A. I wouldn't say too clearly; it was just some dirty books; it wasn't important; I didn't want to see the stuff, so I didn't pay too much attention.

Q. Handing you what has been marked for identification State's Exhibits 1, 2, 3 and 4. I will ask if you identify any of these as the things she took out of that drawer and put it in this box and carried it in the basement?

A. It was something like—it was more than this, more bags and cards and things; I didn't pay too much attention to it.

Q. Would you say this was some of it?

A. I would say it was some of it, yes.

Q. Handing you what has been marked for identification

as State's Exhibit 10, 11, 12, 13. Look at these and tell us if you have ever seen them before? (handing to witness) Did you?

A. Yes.

Q. And where did you see these?

[fol. 70] A. In the paper bag that came out of the dresser.

Q. That is the paper bag that was put in this big box and taken down to the basement?

A. Yes.

Mr. Kearns: You may inquire.

Cross examination of Dolores Clark.

By Mrs. Mahon:

Q. Did you ever help Mrs. Mapp pack or move her things around before?

A. Yes.

Q. How often have you done that?

A. Go to the house and be doing something.

Q. I am asking how often you helped Mrs. Mapp pack before, or move her furniture around?

A. This is the first time I ever helped pack stuff. The men moved and she wanted me to help her. Whenever I am at her house we make coffee, wash dishes; we usually do whatever is to be done.

Q. Do you know which bedroom she was sleeping in?

A. She was sleeping in the room, we were cleaning up this room so she could get back into her room.

Q. You didn't take this bag yourself and put it in the box?

A. I handed them back to her, put all the stuff in the big box.

Q. Those cards you just identified, you say they were [fol. 71] in the paper bag with the books?

A. Put this stuff together.

Q. Please answer the question. You say those cards were in the paper bag with the book?

A. Yes.

Q. Where did she find those?

A. In the dresser drawer.

Q. In the dresser drawer?

A. Yes.

Q. And you say both you and she took the books and the cards and put them in a box?

A. Put them back in the bag, then put them in the box.

Q. And then took them down to the basement with a whole lot of more stuff?

A. It was all men's stuff.

Q. Did you know, Mrs. Clark, the police found those books in her dresser drawer on May 23rd of last year?

Mr. Kearns: Object.

The Court: Objection sustained as to the form of the question.

Q. Can you tell me what was in that room when you were in there packing?

A. Yes.

Q. What was in there? I mean by way of furniture?

A. It was a large bed, a great, huge dresser, a chest.

[fol. 72] Q. Was there a suitcase in the room?

A. I didn't see a suitcase.

Q. And you can't tell us what date you were over there, can you?

A. No, I can't remember that long ago.

Q. You can remember the bags but you can't remember the date; is that right?

A. I remember the bag because she asked me to help her clean up and take up the stuff; I don't know what day of the week it was; all I know I was there.

Q. You say you can't remember the date because it was long ago, is that right?

A. Yes.

Q. You don't know, as a matter of fact, whether it was in April or May, or what month in '57, is that right?

A. It was near the end of April or first of May; still kind of cold out.

Q. You remember that, don't you?

A. Yes.

Q. And you remember seeing those bags, don't you?

A. Yes.

Q. And you saw those pictures too, didn't you?

A. Yes.

Q. Don't shake your head; answer.

A. Yes.

Q. What else did you take down to the basement?

[fol. 73] A. A lot of stuff—boots, hats, papers, shavings and stuff; everything out of the drawers, off the floor, got in the box; everything in this box, then taken to the basement. Then we straightened it up.

Q. You say there were some men's clothes too?

A. It was all men's clothes, everything we put in the box.

Q. Were there some men's clothes?

A. I suppose you would call hats and shoes men's clothes.

Q. In other words, the man who lived in that room didn't take his clothes with him?

A. I don't know what he took with him, but he left quite a bit there.

Q. He left some clothes, is that right?

A. Yes.

Q. Well, let's get specific on this; just what besides those bags and cards did you take down to that basement?

A. Some boots—shoes.

Q. Men's shoes?

A. Yes; and a hat, some shaving stuff; just a whole lot of things, men's things. I remember the books, she showed it to me, and I didn't like it at all. We laughed about it; I said "Don't show it; put it in the bag." And when we finished we took it all to the basement.

Q. Were there any women's clothes in that room?

A. No, there was nothing in it but these things a man [fol. 74] left. We were cleaning the room out so she might move back into the room.

Mrs. Mahon: That's all.

Mr. Kearns: That's all.

Thereupon the defendant, Dollrée Mapp, further to maintain the issues on her part to be maintained, offered herself as a witness in her own behalf, and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearns:

Q. Please speak direct to the jury in answering all questions. Give us your full name, please.

A. Dollree Mapp.

The Court: Spell the first name.

The Witness: D-o-l-l-r-e-e.

The Court: I think I will therefore change the form to the actual fact of her name.

Mrs. Mahon: We will amend the indictment.

The Court: Yes. All right.

Mr. Kearns: No objection.

Q. Have you at any time used the name Dolly, or to your knowledge have you been called Dolly by anyone?

[fol. 75] A. Well, I am called Dolly.

Q. By friends?

A. My friends, yes.

Q. But your real name is Dollree now?

A. Yes.

Q. You are now single?

A. That is correct.

Q. And you are the mother of a daughter?

A. That's correct.

Q. And what is her name?

A. Barbara Bivens.

Q. And how old is she?

A. Fifteen.

Q. Where does she live?

A. With me.

Q. And why is her name Barbara Bivens?

A. I was at one time married to Jimmy Bivens. I am now divorced.

Q. Is he the father of Barbara?

A. That is correct.

Q. Did you at any time go by any other name than Bivens or Mapp?

A. Never.

Q. Where do you live?

A. 14705 Milverton Road.

Q. Will you describe the living quarters, as to the type of house?

A. It is a two-family brick, with front and side entrance [fol. 76] and full basement.

Q. It had a full basement?

A. It has a full basement, yes.

Q. Now, on or about the 23rd day of May, 1957, were you at home?

A. Yes.

Q. Did anything unusual happen?

A. Yes.

Q. Will you tell this jury, please, what happened?

A. At one-thirty someone rang the door bell, and I looked out upstairs, and it was Sergeant Delau, Haney and Dever, and I asked them what they wanted; they said they wanted to come in; I asked for what; they said they wanted to question me about something. I still insisted what he wanted to question me for. He said, "I'll tell you when we come upstairs." And I told them I wouldn't let them in, and they insisted that I should open the door. I told them I would call my attorney, if he tells me to let them in, I would. At that time I called for you, and you were in court, and Mr. Green advised me not to let them in without a search warrant. I went back to the window and told Sergeant Delau what Mr. Green had told me.

Q. Was there anything else said about this search warrant?

A. Sergeant Delau said something like this, "Well, we'll get in."

Q. I mean Mr. Green; did he say anything else to you?

A. No. He told me to make sure that it was a search warrant, and they should let me see it and read it, and then [fol. 77] I should let them in.

Q. Then you advised Sergeant Delau of that fact, what your attorney said?

A. Yes. I told him my attorney said get a warrant, and he said he would have his boss to call me, which he did—Lieutenant Cooney.

Q. Who was his boss?

A. Lieutenant Cooney.

Q. And you talked to the Lieutenant?

A. Yes.

Q. And what did you say to him?

A. I told him the same thing. I told Sergeant Delau—I wouldn't let them in without a warrant.

Q. Then what?

A. Well, I hung up on him, and I called Mr. Green back; I was still trying to locate you; Mr. Green told me not to let them in unless they produced a search warrant, and they had to give the warrant to me to let me read it, and I refused to open the door.

Q. You told them that?

A. Yes. They went across the street, and I could see Sergeant Delau standing in the neighbor's yard. It went on for hours; when I say hours, they were there shortly after one. About four-thirty they started—police started arriv- [fol. 78] ing in cars. I think Mr. Green got there around the same time; and he called to me and asked me if I was going to open the door. I said "Yes, I'll come down. I want to see the search warrant."

Q. Who was it that called to you?

A. I don't know; one of them. At that time I talked to Mr. Green out of the window, and he—he was outside at the back door. They were all at the side door, and they were still coming. At that time I went downstairs to the front door; without opening I called through the door if I could see the search warrant. I was standing on the landing when Sergeant Delau came in; he was the first one in there.

Q. This gentleman? (indicating)

A. Yes. The back door was broken.

Q. Tell us about the breaking.

A. When they came in I said, "Inspector, I want to see the search warrant." And I was standing on the top landing of the stairs, and I didn't know who the inspector was when he was in plain clothes. He said, "Here is the search warrant." He held it back from me, and I remember Mr. Green told me I should see it and read it, and I told him I wanted to see it. He said, "You can't see it." At that I reached over, took the search warrant from his hand and put it down in my bosom.

Q. Was that after the door was broken in?

A. That is correct, and they were inside.

[fol. 79] Q. Give this jury some idea how many police officers, plain clothes and uniformed were there.

A. There were at least a dozen, some plain clothes, some uniform, also the paddy wagon.

Q. Then what?

A. When I grabbed the search warrant off him and put it down in my bosom, one of them said "What are we going to do now?" The one that grabbed me said "I'm going down after it." I said, "No, you are not." He went down anyway.

Q. What did you do that for?

A. Because Mr. Green told me I should read it, and I wanted to read it to make sure it was a search warrant.

Q. Then what happened?

A. He grabbed me, twisted my hand, some lieutenant behind me, and it was hurting. I yelled, I pleaded with him to turn me loose. At this time they were all going upstairs and some downstairs. He asked for handcuffs, I believe, from one of the men in uniform, and he put the handcuffs on me, then later he changed it to a man with uniform.

Q. You mean he handcuffed you to himself at first?

A. I was handcuffed to him at first; that was the one I grabbed the warrant from.

Q. Then he took the handcuff off himself and handcuffed you to a uniformed man?

A. Yes.

[fol. 80] Q. Then what happened?

A. One said to the other, "They are all in the house." He said, "Take her upstairs." I was led upstairs handcuffed to this policeman.

Q. You were led upstairs in the apartment that you occupied is that right?

A. Yes.

Q. And who came in there with you?

A. When I got upstairs Sergeant Delau was in my bedroom, and there was someone else searching my living room; they were all over the place.

Q. Well, was Haney searching?

A. I didn't see Haney at that time; I did not see him; I saw him later.

Q. You say they were all over the place searching. Who do you mean?

A. There were others; they were not the only ones there; there were eight or ten others besides Dever, Haney and Delau.

Q. And they were searching the entire premises?

A. Yes, that is correct.

Q. Men in uniform and without uniform?

A. That is correct.

Q. Now, tell what happened then?

A. Well, naturally, being handcuffed, he pulled me into the bedroom and I sat on the bed. This policeman that I [fol. 81] was handcuffed to stood over to me; Sergeant Delau was going in the drawers. About that time Haney walked in and asked me—he had this brown bag, and asked me—

Q. Walked in from where?

A. I don't know where he came from, but he walked into my bedroom door, and he said, "Does this belong to you?" I asked him not to look at it, it might embarrass him. He asked me again if it belonged to me. I said "no." He said, "Oh, yes, that's the kind of trash you read."

Q. Had you seen these things before?

A. Yes, they were in my bedroom, that I had rented out to this fellow.

Q. What was his name?

A. Morris Jones.

Q. What did you do with them?

A. Well, when he left he didn't move, he went to New York on vacation, and he didn't come back; when I found out why he didn't come back—he had paid up for the month—I was going to clean the room out, take the room for myself, because I was sharing the room with my daughter.

Q. Did you have anyone at all to help you clean the room out?

A. Well, I called Dolores and if she wasn't busy I would pick her up and have her come over to help me. I was going to take my daughter's room and change the furniture.

Q. Is Dolores the girl that just testified before you did? [fol. 82] A. Yes.

Q. Handing you what have been marked for identification State's Exhibits 1, 2, 3 and 4, I want to ask you if you identify these books?

A. Yes.

Q. Where did you first see them?

A. I first saw them when I was in his room during his absence.

Q. When you speak of "him" tell the jury to whom you are referring?

A. Yes, I had rented my room out to this fellow.

Q. Do you know his name?

A. Morris Jones. He was leaving there, he was going to open a cosmetologist school on Cedar. He was there about a month before he moved. Now I meant during his absence when in the school I went to his room, and that was my first knowledge of the books. When he went to New York and didn't come back is when I packed his things, I packed all of the things in this box.

Q. Are these Exhibits 1, 2, 3 and 4 the books that you took out of the room that he occupied and packed with his stuff?

A. Yes.

Q. What did you do with them?

A. I put them all in this box and I took them downstairs, with the help of Dolores, and put them in the corner of the basement.

[fol. 83] Q. Now, handing you what have been marked for identification as State's Exhibits 10, 11, 12 and 13, please look at them and tell us where you saw those?

A. With the books in his room.

Q. Do these State's Exhibits 1, 2, 3 and 4, and Exhibits 10, 11, 12 and 13, belong to you?

A. No.

Q. Did you ever own them?

A. No.

Q. Did you ever have possession of them?

A. No.

Q. They were things taken out of the drawer of Morris Jones', is that correct?

A. That is correct.

Q. Now I will hand you what have been marked for identification State's Exhibits 8 and 9. Exhibit 8 is what?

A. That is me, and Mr. Keeley, a real estate man, and Mrs. Lena Derry.

Q. These pictures were taken where?

A. Chatterbox Musical bar and grill.

Q. And State's Exhibit 9? (handing to witness)

A. The same.

Q. Where did you keep these State's Exhibits 8 and 9?

A. Those were in my desk in the living room.

[fol. 84] Q. And at the time the police officers made the search of your premises, where were State's Exhibits 8 and 9?

A. They were on the desk in the living room, because they had just been made a couple of years before.

Q. Handing you what has been marked for identification State's Exhibit 6, will you tell us what that is?

A. It is a diet; that is my diet.

Q. And where did you get that?

A. From the doctor.

Q. And where was that at the time these police officers made this search?

A. That is always kept in my kitchen.

Mrs. Mahon: Objection.

Q. Where was it that night or that day? Where was it that day that the search was made?

A. I was using this diet; it had to be in the kitchen.

Q. Handing you what is marked for identification State's Exhibit 7, will you tell this jury what that is?

A. This is a chattel mortgage on carpeting that I purchased quite some time ago; this was kept in papers, important papers I had in my daughter's bedroom, top drawer, with other papers.

Q. At the time the search was made where was it?

A. It was with the other papers in my daughter's bedroom I was sharing with her.

[fol. 85] Q. Were any of these exhibits, 8 and 9, 6 and 7, in a suitcase in your room?

A. No; not at any time.

Q. Were they in any of the drawers in your room?

A. No.

Q. Handing you what has been marked for identification State's Exhibit 5, please look at it and tell us if you ever saw that before?

A. Yes, I have.

Q. And where did you see it?

A. It was in the drawer of the room that Morris occupied.

Q. And what, if anything, did you do with it when you cleaned out Morris Jones' room?

A. I used my suitcase and packed some of his things away and put them under the bed, and this is one of the things that was in the suitcase that belonged to me.

Q. You say Morris Jones had paid a month's rent?

A. That is correct.

Q. And had his rental run out at the time the police officers came in and made the search?

A. No, it would have been out June 1st.

Q. And you expected him to come back for his things?

A. I knew he wasn't coming back, that's why I was packing them.

Q. Was there anything else belonging to Morris Jones that you had packed in this suitcase?

[fol. 86] A. Yes, there was a gun, and there was a shirt, silk shirt, there were ties; they were small items; there were socks.

Q. This State's Exhibit 5, did this ever belong to you?

A. Not at any time.

Q. Was it filed in your personal possessions as yours?

A. Absolutely not.

Q. Now there was some evidence here of a 25 caliber gun. At the time the police officers made the search of your premises, where was that gun kept?

A. Well, I had packed the gun along with that sketch you just gave me, and other things, in my suitcase and put it under the bed.

Q. With the other things belonging to Morris Jones?

A. That is correct.

Q. Did you know at that time whether Morris Jones would come back, or not?

A. I knew he wouldn't come back; I had talked to his mother long distance.

Q. And was there anything else with this gun, that you haven't yet described, in this suitcase?

A. Well, just his effects; there were letters, there was a cosmetology book; there were school papers.

Q. There was what?

A. School papers.

[fol. 87] Q. Was he studying cosmetology?

A. That is correct.

Mrs. Mahon: I haven't seen that at all.

Mr. Kearns: I am going to show it to you. (handing to prosecutor.) Mark these.

(Thereupon book was marked Defendant's Exhibit A, and papers marked Defendant's Exhibits B and C, respectively, for identification.)

Q. Handing you what has been marked for identification as Defendant's Exhibit A, I want to ask you whether you ever saw this before?

A. Yes, I did.

Q. And where did you see it?

A. It was in the drawer and I put it in the suitcase along with Morris' other things.

Q. When you were in this room and officer Haney or Sergeant Delau searched this room, do you know, or did you see where they found that book?

A. Yes, they found it in the suitcase because I was sitting on the bed, and he put the suitcase on the bed with me, and when I told him it belonged to Morris Jones, he said he didn't need it.

Q. He said what?

A. He didn't need it.

Q. Who said that?

A. Haney said it.

[fol. 88] Q. Handing you what has been marked for identification as Defendant's Exhibits B and C, have you ever seen them before?

A. Yes.

Q. And where?

A. This is some of his school work; Morris Jones' school work.

Q. And where were they in connection with this book of Cosmetology?

A. They were in the suitcase also.

Q. They were in the suitcase?

A. Yes.

Q. But where were they taken from, if you know?

A. From the suitcase.

Q. By whom?

A. By Haney.

Q. Now we spoke of State's Exhibits 1, 2, 3 and 4, which are these books. Where were these books on the day of this search by the police officers?

A. They were in the basement in a box, along with other things that belonged to Morris Jones.

Q. And who had put them there?

A. I had put them there myself.

Q. And where were State's Exhibits 10, 11, 12 and 13 on the day of this search?

A. They were also there in the basement, in the same bag, as a matter of fact.

[fol. 89] Q. And is that the bag that officer Haney walked into the bedroom with that you spoke of?

A. Yes.

Q. And these things were in that bag?

A. Yes.

Q. And prior to that date, to your knowledge, they were in the basement, is that right?

A. They were in the basement.

Q. And when you were taken down to Central Police Station and questioned by Sergeant Delau, you told him that these things belonged to Morris Jones?

A. That is correct.

Q. Were you ever given an opportunity to read that search warrant?

A. I never had—I never read one word on there.

Q. Now, there was some testimony here about crayons, child's crayons. Where were they and where did the police officers find them?

A. Well, Sergeant Delau went in my daughter's room; I did not go with him; but the crayons, they were on my daughter's—she has a little desk with crayons and drawing board on the desk, and they were there.

Q. Did they show you these crayons at any time and ask you about them?

A. Yes.

[fol. 90] Q. Who did that?

A. Sergeant Delau showed them to me in the police station.

Q. And what did he say about that?

A. He asked me if they belonged to my daughter.

Q. And what did you say?

A. Yes, they were hers.

Q. That they were hers?

A. That is correct.

Q. Did he tell you then at the police station where he found them?

A. No, he did not.

Q. I am going to ask you, finally, whether State's Exhibit 5, which is this drawing, was ever in your possession except as you have described?

A. Not at any time.

Q. Did it ever belong to you?

A. No.

Q. I am going to ask you whether State's Exhibits 1, 2, 3 and 4, or any of them, were ever your property?

A. Not at any time.

Q. Or did you ever have possession of them except as you have described to this jury?

A. No.

Q. I am going to ask you whether State's Exhibits 10, 11, 12 and 13 were ever your property?

[fol. 91] A. No.

Q. Did you ever have possession of them except as you have described to this jury?

A. No.

Mr. Kearns: That is all, your honor.

Cross examination of Dollree Mapp.

By Mrs. Mahon:

Q. How long did Morris Jones live at your place?

A. Off and on for about a year,—off and on.

Q. Off and on. What do you mean by off and on?

A. He was traveling back and forth to New York.

Q. Well, did he rent the rooms at intervals, monthly, or what?

A. No, it was a permanent thing.

Q. It was a permanent thing?

A. Yes.

Q. Well, his rent hadn't run out in May, had it, when you were moving his things out?

A. I knew he wouldn't be back; his mother called me long distance. He got in trouble and she called me.

Q. Didn't you testify here his rent hadn't run out?

A. It had.

Q. At the time?

A. At the time I was packing his things, no, it hadn't run out.

Q. All of these things you related—rather none of it that [fol. 92] you related here did you tell the police at the time of your arrest, did you?

A. Yes, I did tell the police.

Q. Did you tell them that these various books, pictures and everything, that you had taken them down to the basement?

A. I told them just like I am telling you now, that they didn't belong to me, and told them before they took me to the jail who they belonged to, all of them.

Q. Did you tell them you had taken them down to the basement?

A. They didn't ask me.

Q. They didn't ask you?

A. No.

Q. Did you tell them about the pictures, that you put them into a box and took them down to the basement?

A. That was the only thing they asked me; I told them no.

Q. As a matter of fact, they found these things in your bedroom, didn't they,—the books and pictures?

A. No, they did not.

Q. You say you took the pictures and the books and put them down in the basement?

A. No, the other things that belonged to Morri Jones.

Q. How come you put things in the suitcase?

A. Because I took all the things that belonged to him; he had powder, pencils, fingernail polish, everything that you use for cosmetology.

[fol. 93] Q. Well, you were packing his things in a box?

A. His mother asked me to pack his things.

Q. I didn't ask you that. You say you were taking his things down to the basement, and you put them back in your suitcase, is that right?

A. That is correct.

Q. The suitcase belonged to you?

A. That is correct.

Q. And it was a woman's suit case?

A. That is correct.

Q. And in this suitcase you had this souvenir, State's Exhibit 8, didn't you?

A. No, not in my suitcase.

Q. Where did you have it?

A. In the living room on the desk.

Q. You say that is where the police got them, not out of the suitcase?

A. I know where they got them, yes, both of those.

Q. Both of these were in the living room?

A. Yes, both of those; they were on the desk.

Q. So that these officers are lying here, is that right, when they say they got them out of your suitcase?

Mr. Kearns: Object. Just a minute, please.

Q. Well, you heard both police officers testify, rather patrolman Haney testified concerning this diet sheet of [fol. 94] yours, State's Exhibit 6, this chattel mortgage, State's Exhibit 7, this souvenir photo taken at the Chatterbox, State's Exhibits 8 and 9,—you heard patrolman Haney testify that he got these out of your suitcase in your bedroom. Is that right?

A. No.

Q. Didn't you hear him so testify?

A. Yes, I heard him say that.

Q. And you say they were found on the desk?

A. I am telling you where they were found; they were on my desk in the living room. I live there, I put them there.

Q. You were present when Haney was searching your bedroom?

A. I was present.

Q. He was present there when they were searching?

A. Yes. I was sitting on the bed.

Q. You were present when he was searching your suitcase?

A. Yes. He did not take them out of my suitcase.

Q. He didn't?

A. No, he did not.

Q. And in searching your suitcase patrolman Haney found State's Exhibit 5; you heard him so testify?

A. He is correct; he did find that there.

Q. In your suitcase?

A. In my suitcase, with the things that belonged to Morris Jones; I put them there.

[fol. 95] Q. You put them in the suitcase and the book?

A. Along with the cosmetology book.

Q. What else was in that suitcase that belonged to Morris Jones?

A. Everything in there belonged to Morris Jones.

Q. The suitcase was yours, however, wasn't it?

A. Yes.

Q. But you do say that patrolman Haney did get this out of your suitcase, State's Exhibit 5?

A. Yes; I put it there.

Q. Now you heard officer Delau testify that he found these four groups of pictures in a dresser drawer in your bedroom?

A. Yes.

Q. You heard him testify to that?

A. Yes.

Q. Is he telling the truth?

Mr. Kearns: Object, if the court please.

The Court: She may answer that.

A. So far as I am concerned he is not.

Q. Sergeant Delau is not telling the truth when he said he found them in your presence—you were present, were you?

A. Yes, I was present with two other officers.

Q. Was Sergeant Delau searching your bedroom when you were there?

A. Yes.

Q. He was?

[fol. 96] A. Yes.

Q. Where do you say they were?

A. I packed them along with the bags, put them in the cardboard box and took them with other things belonging to Jones; I put the books and the pictures together.

Q. So Sergeant Delau is mistaken when he said he found these in a dresser drawer in your bedroom?

Mr. Kearns: Object.

The Court: Objection overruled.

A. Yes.

Q. Now you heard patrolman Haney testify that he found these four books, State's Exhibits 1, 2, 3 and 4 in your bedroom in a dresser also?

A. Yes.

Q. You heard him so testify?

A. Yes, I heard that.

Q. And you say these were not in the bedroom, that they were down in the basement?

A. They were in the basement.

Q. They were in the basement?

A. Yes; he walked in the door with the bag in his hand and asked me if they belonged to me; I was sitting on the bed.

Q. You were sitting on the bed?

A. That is correct.

Q. You are telling us now that patrolman Haney found [fol. 97] these in the basement instead of, as he testified here, in a dresser in your bedroom?

A. He did not find them in my bedroom.

Q. He didn't?

A. He did not.

Q. When did Morris Jones start this beauty course that he was taking?

A. He started in the latter part of '56.

Q. The latter part of '56?

A. Yes.

Q. Where did he attend the cosmetology class?

A. Beatrice School on Cedar.

Q. How long did he attend it?

A. I would say about three or four months.

Q. You didn't turn this book over to the police at any time, did you, as belonging to Morris Jones and being in the suitcase?

A. Yes, I offered it to patrolman Haney; he said he didn't need it.

Q. This book has been in your possession all this time up until this trial?

A. No.

Q. Who did you turn it over to?

A. My attorney.

Q. Mr. Green?

[fol. 98] A. Yes.

Q. When did you turn this book over to him?

A. I don't remember, but it was after—it was after I was arrested.

Q. Do you know where Morris Jones is now?

A. No, I do not.

Q. Was this Jones employed?

A. I think he started at Republic Steel, because they sent a telegram there for him; I do believe he worked there a very short time.

Q. What did he do there, do you know?

A. No, I don't know.

Q. Did he at any time work at any beauty school?

A. He is a student.

Q. At this place, you own that home, don't you?

A. No, I do not own it.

Q. You are not just renting there, are you?

A. I am renting.

Q. Well, you yourself collected rent from the downstairs suite, didn't you?

A. I collected rent from the downstairs suite? Yes.

Q. For the owner?

A. For the owner.

Q. What is her name?

A. Mrs. Miller.

[fol. 99] Q. Did you pay rent to her?

A. Absolutely.

Q. How much rent?

A. Ninety dollars.

Q. Ninety dollars a month?

A. Yes.

Q. Mrs. Mapp, you heard patrolman Haney testify here that when he found those books you said to him, "Don't read them, they might excite you"; do you remember he testified that?

A. I heard him say that, yes.

Q. You said that to him, didn't you?

A. I told him not to look at them, they might embarrass him.

Q. You did say that?

A. Yes, I did say that.

Q. You were questioned about that gun that was found in the room?

A. No, I was not.

Q. You weren't?

A. No.

Q. You never told the police anything about it?

A. They might have asked; I don't say they didn't.

Q. To whom did that gun belong?

A. To Morris Jones.

Q. That was some property of his that you didn't take to the basement?

[fol. 100] A. No, it wasn't in the basement.

Q. That was where?

A. That was upstairs.

Q. Where?

A. In the suitcase.

Q. In the suitcase the gun was?

A. Yes, along with a box of cartridges; I put them there.

Q. On one of these souvenir photos, perhaps both of them, you said a man was Mr. Keeley?

A. Yes.

Q. That is State's Exhibit 9. That is Mr. Keeley with you?

A. Yes.

Q. Who is the lady?

A. Mrs. Derry.

Q. Is Keeley a boy friend of yours?

Mr. Kearns: Objection.

The Court: Objection sustained.

Q. Have you been going around with Mr. Keeley?

Mr. Kearns: Object.

The Court: Sustained.

Mrs. Mahon: On what ground?

The Court: It doesn't bear on the issue of the case.

Q. To this day has Morris Jones ever come to your home to get any of his property?

[fol. 101] A. His mother came.

Q. His mother came?

A. Yes.

Q. When?

A. Oh, it was later; I think it was October, somewhere along there; it was chilly.

Q. She came to get his property?

A. Yes.

Q. What did you turn over to her?

A. Everything that I had I gave to her.

Q. You had this book?

A. My lawyer had it.

Q. You didn't turn this over?

A. My attorney had the book.

Q. But that belonged, you say, to Morris Jones?

A. Yes, it does.

Q. Did you explain to the mother about the books and the photographs?

Mr. Kearns: Object.

A. No.

The Court: Overruled.

Q. Where did the mother come from?

A. Tennessee.

Q. Tennessee?

A. Yes.

[fol. 102] Q. How did you know you had anything belonging to Morris Jones?

Mr. Kearns: Object.

The Court: Objection sustained.

Q. What is his mother's name?

A. Mrs. Jones is all I know.

Q. Mrs. Jones?

A. Yes.

Q. Had you ever met her before?

A. Only when she came there to my house to get his things.

Mrs. Mahon: That's all.

Mr. Kearns: Just one question: This box you speak of that you had packed Morris Jones' stuff in and put in the basement, that was not the large foot locker that has been mentioned in this case?

The Witness: No, the foot locker, that is an entirely different thing.

Mr. Kearns: That's all.

Mrs. Mahon: That's all.

Mr. Kearns: Now, may it please your honor, on behalf of the defense we would like to introduce Defendant's Exhibits A, B and C, as they were identified.

Mrs. Mahon: Objection.

The Court: What is your ground of objection, Mrs. Mahon?

[fol. 103] Mrs. Mahon: She has testified here that that book belonged to him; we don't have any testimony of any Morris Jones here that is his property.

The Court: Well, they may be received.

Mr. Kearns: She also testified it was taken out of the suitcase.

The Court: They may be received, all three of them, A, B and C, may be received.

Mr. Kearns: And with that the defense rests.

The Court: Is there anything by way of rebuttal?

Mrs. Mahon: No rebuttal.

Thereupon the State rested.

Thereupon the defense rested.

Testimony closed.

* * * * * * *

[fol. 105] CHARGE OF THE COURT

LYBARGER, J.:

Ladies and gentlemen of the jury, it now becomes the duty of the court to instruct you in the law that governs this case. It likewise becomes your duty to accept the law as this court gives it to you, to adopt it as a guide for your determination of what the facts actually are in this matter, and by that means to arrive at a verdict which will be just and fair. You, ladies and gentlemen of the jury, must determine what the facts are, what is the truth in this matter. You should approach this task with an open mind, and in all fairness, having in mind your oath as jurors that you

would not be influenced by sympathy or prejudice against either the State or the accused.

At the outset the court should define for you what is meant by evidence, and how you are to weigh the testimony in this case. Throughout the course of the trial on occasion the court has ruled for or against the admission of evidence when objections were raised, either by the State or the defense. You will draw no inference of any kind from any of the rulings of the court as on questions of law; neither [fol. 106] will you because of any such rulings, or any other expression of the court, infer that the court has any opinion as to the guilt or innocence of the accused in this case. You are the exclusive judges of all the facts in this case, and the court must not and does not invade the province of the jury by reflecting upon the facts at issue in any manner whatsoever.

At the opening of the case, and presently at the close of the case, very able counsel on both sides of the trial table addressed you, first the opening statements and then closing arguments in summation. They were entitled to do so under the law, and you will keep in mind, however, that anything that was said was not to be received as evidence, but may or may not be of assistance in helping you to arrive at a conclusion in the case, depending on how you view the argument.

The indictment in this case, which the court will soon read to you, is not to be considered as evidence; it serves to inform the defendant of the charge made against her by the State; the mere fact that the defendant was indicted by the grand jury does not constitute evidence, or raise any presumption of the guilt or innocence of the accused. The [fol. 107] evidence upon which you must decide this case is what was presented to you from the witness stand, together with any exhibits which were received into evidence. You, ladies and gentlemen of the jury, are the sole and exclusive judges in this case in determining where the truth lies; it is your duty to weigh the testimony of all the witnesses and decide what faith, credit and confidence you will give to the testimony.

In passing upon the credibility of the witnesses you may consider, among other things, their manner of testifying on

the witness stand, their apparent intelligence, candor and truthfulness, or the lack of these qualities; their interest, bias or prejudice; their means of knowing and remembering the facts about which they testified, and the reasonableness or unreasonableness of what they had to say; did a witness appear to be telling a full, honest story, or to be withholding or exaggerating or understating certain facts.

It is your privilege to believe all that a witness said, or to believe none; or you may believe a part and disbelieve another part of a witness's testimony. Take all these things into consideration and give to the testimony of each witness [fol. 108] such weight and credit as in your honest judgment it deserves.

The defendant, Dollree Mapp, comes into this court for trial by reason of an indictment returned by the grand jury in essentially these words: "The grand jury do find and present that within and for, on or about the 23rd day of May, 1957, at the county aforesaid, (being Cuyahoga County, Ohio) unlawfully and knowingly had in her possession and under her control certain lewd and lascivious books, pictures and photographs, said books, pictures and photographs being so indecent and immoral in their nature that the same would be offensive to the court and improper to be placed upon the records thereof."

To this indictment the defendant has returned a plea of not guilty; by this plea the defendant puts at issue every material element of the indictment and of the offenses charged therein. The defendant denies the existence of each element which constitutes the crime charged in the indictment. The plea of not guilty entered by the defendant clothes her with the legal presumption of innocence. This presumption is not a mere matter of form, but is rather a shield which the law throws about the defendant. The presumption of innocence is accorded to the defendant from the [fol. 109] moment that protection was first cast upon her, and which remains with her throughout the trial.

The presumption of innocence is only overcome when you, the jury, find the evidence is such as to exclude every reasonable doubt of the guilt of the defendant. This plea of not guilty tendered by the defendant places upon the State of Ohio the burden of pr ing beyond a reasonable doubt

each and every element that constitutes the allegations in the indictment, and of proving beyond a reasonable doubt each and every element of the offense that is charged therein. The law of Ohio has this to say concerning the presumption of innocence: A defendant in a criminal case is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown he shall be acquitted.

This presumption of innocence places upon the State the burden of proving the guilt beyond a reasonable doubt. The law also requires that I read to you from the statute this definition; reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs or depending upon moral evidence is open [fol. 110] to some possible or imaginary doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

To doubt is to be honestly uncertain of the truth or of a fact; a reasonable doubt is a substantial doubt; it is not an unreasonable doubt; it is not a capricious doubt based merely upon conjecture, but it is a doubt based upon reason; it must be a doubt honestly uncertain and not a doubt originating in your mind from a desire to avoid the performance of a disagreeable duty; it is not a doubt created by any feeling of sympathy, passion or information not based upon the evidence in the case.

The rule of law which clothes every person accused of crime with the presumption of innocence, and casts upon the State the burden of proving him guilty beyond a reasonable doubt, is a humane provision of the law, intended to guard against the danger of an innocent person being unjustly punished; but the rule is not intended to aid a person who is in fact guilty to escape.

[fol. 111] When after a full and impartial consideration of all the evidence, the judgment of the jury is convinced to a moral certainty that the defendant is guilty as charged in the indictment, and there is no reasonable explanation of the fact proven except upon the hypothesis that the defen-

dant, in fact, committed the crime charged, then every reasonable doubt is removed and a verdict of guilty should follow.

You should examine all the evidence with an honest purpose to ascertain the truth and render your verdict accordingly, irrespective of what consequences may follow your verdict.

I come now to define for you the law that bears particularly upon this case. The Revised Code of Ohio contains this section, which I shall read for you only in part as it may apply to the charges here made, omitting those parts which have no reference, since the statute is all-inclusive and covers many subjects.

"No person shall knowingly have in his possession or under his control an obscene, lewd or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, circular, print, picture, photo- [fol. 112] graph, or pictures and stories of immoral deeds, lust or crime."

In order to find the defendant, Dollree Mapp, guilty as charged in the indictment, the State must prove beyond a reasonable doubt each and all of the following elements, which I shall enumerate:

(1) That the crime was committed in this state and county on or about the date alleged in the indictment.

(2) That the act was done unlawfully, that is, in violation of a statute of Ohio; and that it was done knowingly, that is, voluntarily, of one's own choice, not accidentally. This signifies an act of the will, an intention to possess and have under one's control the things alleged in the indictment, which knowledge and intention must have been present at the time when the act complained of was done. The law presumes that a sane person intends the ordinary consequences of his own voluntary acts.

(3) That the defendant had in her possession and under her control the books, pictures and photographs mentioned in the indictment. "Possession" means the act or state of detaining a thing; it is the act of holding or keeping it. Now, such detention does not mean that it is necessary al-

ways to have in one's sight the thing possessed. For ex-
[fol. 113] ample, one who deposits articles in a place of concealment may still be deemed to have them in his possession. To have something under one's control is to have the present right and power to do with it as one will.

Neither possession or control necessarily means ownership. If a person possesses something it does not necessarily mean that he owns it. The test is whether or not the defendant had some degree of possession and control over the material as alleged in the indictment.

(4) That the books, pictures and photographs set forth in the indictment are obscene, lewd or lascivious. To be obscene the material must be calculated to appeal to a reader's or viewer's prurient interest, that is to say, it must have as its dominant purpose and effect erotic allurement, a calculated and effective excitement to sexual desire.

The term "lewd" as used in the law means lustful, sensual, pornographic. "Lascivious" means wanton, tending to produce voluptuous emotions. "Prurient" means inclined to or characterized by lascivious thought. The standard for judging obscenity is whether to the average person applying
[fol. 114] contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.

Ladies and gentlemen of the jury, if beyond a reasonable doubt you are convinced that the State has proved that on or about the 23rd day of May, 1957, in this county, Dollree Mapp unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, and that the State has proved beyond a reasonable doubt all of the essential elements of the crime as I have defined them for you, then it will be your duty to return a verdict of guilty; on the other hand, if the State has not proved to you beyond a reasonable doubt any one of the elements which I have just defined for you, then it will be your duty to return a verdict of not guilty. It is for you to decide. I have charged you to pay strict attention to the evidence and the law, the evidence as given in court and the law as given to you by the judge.

You will now retire to your jury room; there you will elect one of your number as foreman, which may be either man or woman. The foreman will have no greater authority [fol. 115] than anyone else, except he will preside and see that your deliberations are regular and orderly. You will have with you in the jury room the indictment, which the court admonishes you again is not to be considered as evidence; you will have with you in the jury room the exhibits, which are to be considered as evidence. During your deliberations and until you have reached a verdict, you will be kept together, unless you are otherwise discharged by the court, or permitted to separate for a good purpose. Should you desire to address any communication to the court during your deliberations concerning this case, you will do so in writing, signed by your foreman, and deliver to Mr. O'Grady, the court bailiff, in whose charge you will be while deliberating.

In order to arrive at a verdict in this case it is necessary that all twelve of you be of one mind in agreement. So far as conviction goes, there can be no conviction until all twelve are of one mind, and if twelve of you do not so agree then there is no conviction.

You will be handed two forms of verdict; you will use the one which meets with your unanimous approval. One says, "We the jury in this case, being duly impaneled and [fol. 116] sworn, do find the defendant, Dollree Map, not guilty." The other says, "We the jury in this case, being duly impaneled and sworn, do find the defendant Dollree Mapp guilty of possession of obscene literature as charged in the indictment.

The fact that the court submits these to you and reads them to you should raise no presumption in your minds as to which one you should use; that is entirely up to you. The court charges you that in determining the question of guilt or innocence of the accused, you are not to consider for a minute anything concerning punishment. Punishment is entirely a province of the court and not the jury.

One final word, ladies and gentlemen. This case is of great importance to the State, and it is of great importance to the defendant, Dollree Mapp. You as citizens and jurors are now called on to decide the important question of the

guilt or innocence of the accused. It is essential for the welfare of society that those who are guilty of crime should be found guilty, but it is also essential that anyone that is innocent should be found innocent. So I charge you to deliberate carefully, in accordance with your oath, and to return a verdict which will respond to the facts in the case [fol. 117] as you find them to be, and the law as this court has given it to you.

The Court: Is there anything further?

Mrs. Mahon: No, your honor.

Mr. Kearns: Nothing on behalf of the defense, your honor.

* * * * * * * *

[fol. 118]

IN THE COURT OF COMMON PLEAS

STATEMENT OF PROCEEDINGS

* * * * * * * *

9-3-58 Defts mo to suppress evidence, overruled. Indictment amended to indicate Deft's correct name "Dollree," Jury imp & sworn. On trial, Progress.

Lybarger J.

* * * * * * * *

[fol. 119]

IN COURT OF COMMON PLEAS

CRIMINAL BRANCH

Cause No. 68326

[Title omitted]

MOTION FOR A NEW TRIAL—Filed September 6, 1958

Now comes the defendant by her attorney, A. L. Kearns, and moves this honorable court for an order granting her a new trial for the following reasons.

1. That the verdict of the jury and the judgment of the court was contrary to the manifest weight of the evidence and contrary to law.

2. That Sec. 2905.34 of the Revised Code of Ohio is unconstitutional.

3. That the defendant herein was denied her constitutional right to due process of law.

4. That the court erred in over-ruling the motion of the defendant duly filed before trial for suppression of the evidence.

5. That the court erred in the admission of evidence offered by the State of Ohio over the objections of the defense.

[fol. 120] 6. That the court erred in over-ruling the motion of the defendant for a directed verdict of discharge upon the resting by the state of Ohio.

7. That the court erred in over-ruling the motion for a directed verdict at the close of all of the evidence.

8. Other errors appearing on the face of the record and duly objected to by the defense.

A. L. Kearns, Attorney for the Defendant, 1101 Hippodrome Bldg., Cleveland 14, Ohio, MAin 1-3543.

[fol. 120a] [File endorsement omitted]

9/8/28

Overruled

Lybarger J.

[fol. 121] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

NOTICE OF APPEAL—Filed September 26, 1958

Now comes the defendant by her attorney, A. L. Kearns, and gives this her notice of appeal of this cause to the Eighth District Court of Appeals of Ohio, Cuyahoga County.

This appeal is on questions of law, from the Judgment of conviction and sentence on or about the 4th day of September, 1958.

Errors complained of:

1. That the verdict of the jury and the Judgment of the Court was contrary to the manifest weight of the evidence and contrary to law.
2. That Sec. 2905.34 of the Rev. Code of O., under which this defendant was indicted, tried, convicted and sentenced is unconstitutional and deprived this defendant of her constitutional Rights and guarantees.
3. That this defendant was denied her constitutional rights to "Due Process of Law".
4. That the Court erred in over-ruling the motion of the defendant for suppression of the evidence.

[fol. 122]

5. That the Court erred in the admission of evidence objected to by defendant.
6. That the Court erred and deprived defendant of her constitutional guarantees in that cruel and unusual punishment was inflicted.
7. That the Court erred in overruling the motion of the defendant for a directed verdict of not guilty and discharge upon the resting by the State of Ohio.
8. That the Court erred in overruling the motion for a directed verdict at the close of all of the evidence.

9. Other errors appearing on the face of the record and duly objected to by the defense.

NOTICE

The State of Ohio will take notice that the defendant has filed her above notice of appeal together with assignments of error.

A. L. Kearns, Attorney for Defendant, 1101 Hippodrome Bldg., Cleveland 14, Ohio, MAin 1-3543.

ACKNOWLEDGEMENT

John T. Corrigan, Prosecuting Attorney in and for Cuyahoga County, Ohio acknowledges receipt of copy of aforesaid notice this 26 day of September, 1958.

John T. Corrigan

[fol. 123] [File endorsement omitted]

IN THE COURT OF APPEALS

STATE OF OHIO, Plaintiff-Appellee,

—vs—

DOLLREE MAPP, Defendant-Appellant.

EXCERPTS FROM BRIEF OF DEFENDANT-APPELLANT AND REFERENCE TO ASSIGNMENT OF ERRORS—Filed November 14, 1958

* * * * * * *

[fol. 124] One would expect that this record would show a seizure by police in a store dedicated to profit regardless of the illegal nature of its merchandise, with window displays to lure the buyers. On the contrary the police operation was the result of other aims;—Mrs. Mapp's private home was forced, and then entry sought to be justified by claim of search warrant, never allowed to be seen, let alone

read by the defendant, shown to her attorneys, or produced in Court by the police;—at all events, there is and was never a claim that the dwelling of Mrs. Mapp was entered or the purpose of search was for the statutory purpose of R. C. 2905.35.

[fol. 125] There were from 7 to 12 police officers involved, they came according to Patrolman Haney to find some man for questioning as to a bombing, which some unknown said might be at the address. No such man ever was there. (B. of Ex. 19). There is no better way to present the situation than to quote from the Bill of Exceptions, see Pg. 74:

* * * * * * *

[fol. 126] ARGUMENT

Before we specifically point out the errors in trial, it may be of value, to give the history of the statute, and to make some observations on the case as a whole.

Until 1955-56, there was declared by the law a requirement under which no one could possibly be accused under circumstances like that at bar. We copy some portions from the old law.

> "Sec. 13035. Disposing of, exhibiting, advertising, etc., obscene literature or drugs for criminal purposes. Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or *has in his possession for such purpose*, an obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing"....

Now we have such indefinite terms, with the cruelest and most unusual of punishments, for what anyone can be convicted, no matter how innocent of purpose. We must there-[fol. 127] fore so interpret the terms of the new statute as to defeat such a consequence, or make the Law unconstitutional.

This is said in 171 Pac. (2d) 360,
v. *Oregon Liquor Control Commission*;

> "Syl. 3: The policy of the law is not to punish the innocent, and Courts must look beyond the strict or

literal sense of words in a statute to avoid an absurd or unjust result, and all laws shall receive a sensible construction."

"Syl. 4: The rule of construction according to the spirit of the law is applicable where adherence to the letter will result in absurdity or injustice".

There is no need to review every part of the statute, and show the vagueness, lack of standards in the elements, but we must believe that there is no intent in the law to condemn for acts which would be innocent under the old statute.

We cannot believe that one must deal with the property of another under circumstances like that at bar by destruction, when destruction, even of any contraband, is still a crime; and while we could find no decisons defining "possession of lewd literature", we did find decisions relating to intoxicating liquors possession which establish the principle applicable at bar, and shall give them under the proper heading to show there was not established "possession" within the meaning and intent of the statute.

See *State* v. *Donovan*, Syl. 1, 183 Pac. 127, (Though un- [fol. 128] lawfully acquired, as ivory checks for gambling, they are subject of larceny)

"Outlawed whiskey may be the subject of grand larceny, where taken from one claiming ownership, although the law would not afford any one damages for its taking or give any one relief looking to its recovery". (See full discussion therein)

See Slot machines as a subject of burglary, 90 Pac. (2d) 854. *People* v. *Walker*, Syl. 6; and 58 Pac. (2d) 472, *State* v. *Stover;* see also 95 Pac. (2d) 709, page 717, *State* v. *Mellemberger.*

Books condemned in one state have been held proper in others; and some improper for one kind of owner, are legally possessed by another. This is sufficient to show why the law does not allow destruction, or denial of the property rights of another, regardless of the object.

We now proceed to discuss the elements involved in the charge of "possession", and the errors in the charge, and the entire conviction and sentence.

Discussion

I. There was no possession or control by Dollree Mapp of the articles under the Statute.

We need not repeat the facts. The very nature of the situation, shows none of the indicia of a vicious act, such as a seller's or exhibitor's, who caters to depraved minds. She was a mother with a thirteen year old daughter. The books [fol. 129] and pictures were not her property, but of a roomer,—they were packed away, to await his disposition. The cases we shall quote, though on "possession or control" of unlawful objects, such as intoxicating liquors are clear that circumstances like that at bar, establish lack of possession and control.

See 190 N. W. 622, *People* v. *Archer*, Syl. 2:

> "Mere knowledge of accused that co-defendant, for whom she was acting as housekeeper, had liquor in the home unlawfully, would not render her guilty of having it unlawfully in her possession".

(the Court had charged—"allowed to remain there, tho not hers and she retained it in house—was guilty" —held error)

See 281 F. 131, *Presont* v. *U. S.* (U. S. Ct. of App. 6th Cir.)

> "On trial of defendants, respectively owner and tenant of a building charged under National Prohibition Act . . . maintaining a common nuisance, an instruction that, if defendants knew of the violation of the law by a subtenant and failed to report it, they might be convicted . . . held erroneous".

See also 269 Pac. 476 (Case 2) *State* v. *Flint*.

(While in jail on charge of drunkenness, moonshine found in his house—insufficient—he claimed house was broken into while absent)

Quotation page 479: "In *Tearney* v. *State*, 185 Pac. 1104, it is stated that defendant ran a restaurant and rooming house situated across the street from each other. Two

police officers found 9 pints of whiskey in room No. 9 of rooming house, in a dresser drawer, covered with heavy pieces of paper. The defendant denied any knowledge of [fol. 130] the whiskey which was found, and testified that he had run the rooming house for about a year, and that a man named White an oil field worker had occupied room No. 9 for several months. His wife and son-in-law also testified the latter fact—The Court said—"As a matter of law, the evidence is insufficient to sustain the conviction."

Cites also *State* v. *Waxman*, 93 N. J. Law 27, 107 Atl. 150;—charge that there was an illegal sale of liquor. . . . "if defendant knew or had reason to know that his employees were selling liquor, he is liable, is erroneous, as attempting to base defendant's liability upon the law of negligence and not upon criminal intent."

See also 170 Atl. (Penn.) 699, *Com.* v. *Guild.*

"Syl. 1:

"Presumably, control of property actually rented to third party, passed from owner to tenant."

"Syl. 5:

"Mere silence, even in felonies, after knowledge of crime having been committed, does not make party failing to report offense an 'accomplice' or accessory after fact."

Thus, there was no possession or control, and Dollree Mapp is not guilty of any offense.

II. The instructions of the Court were seriously at fault, and caused the conviction of the accused though she should have been acquitted.

Before we proceed to specific portions of the charge to the jury, on which we have applicable authority, of the [fol. 131] errors therein, we wish to point out that the charge was in additional places unfair, misleading, and incorrect,—especially with a term so loose, and needing accuracy of pertinent application, as "possession and control."

Thus the Trial Judge told the jury:

> "One who deposits articles in a place of concealment may still be deemed to have them in his possession". (B. of Ex. Pg. 113)

The fact the woman in the usual way, when a roomer left his things, put them in a box or bag,—so she could use his room, as he was no longer to occupy it,—to be called for, as his right by whomever he sent for them—became the means of the Trial Judge implying—'because she did not exhibit or leave them out, she was nevertheless in possession, they being concealed'.

Again the Court used words as "detaining", "holding", so she became criminally chargeable to the jury for what was at most a mere superficial possession (in the loosest sense), and not the substantial act of a real possessor for a guilty purpose.

The Courts have warned of the danger of inaccuracy in use of such terms, lest injustice be done.

Particularly we must point to the erroneous instruction, which the Courts have declared reversible error, thus the Court said: (See B. of Ex. Pg. 112)

> "The law presumes that a sane person intends the ordinary consequences of his own voluntary acts,"—

omitting the qualifications required by law, and not using [fol. 132] the requisite words "natural and probable consequences", but "ordinary".

In the following cases such an instruction at bar, is condemned, as confusing and misleading to the jury:

282 S. W. (2d) 533, *State* v. *Cook*, pg. 535:

> "We hold that in the presence of the actual facts, as testified to here by eye witnesses, it was improper to instruct the jury concerning a presumption of intent and malice. This rule is actually no different from that in civil cases to the effect that in the face of substantial evidence of the actual facts, a presumption of fact disappears and has no evidentiary value as such, although the facts from which the presumption arose remain in the case."

260 S. W. (2d) 536, *State* v. *Martin*, Syl. 2:

"The presumption that a sane man intends the natural and probable consequences of his intentional acts is not a conclusive presumption in the sense that it is a rule of substantive law, which applies regardless of facts and which cannot be contradicted by evidence to the contrary."

Syl. 4:

"In prosecution for murder, instruction that law presumes that every person intends natural and probable consequences of his own voluntary acts, and that if he intentionally uses upon another a deadly weapon at vital part of body, he is presumed to intend death or great bodily harm to person against whom such weapon is used, was erroneous."

Syl. 7:

"Instructions to the jury dealing with abstractions are usually undesirable in criminal cases."

[fol. 133] Syl. 9:

"Presumption as to the defendant's mental intent does not exist in the presence of facts disclosed to the jury, and in such circumstances instruction on presumption should not be given".

Pg. 541: . . . "and in civil cases, we condemn instructions as confusing and misleading which tell the jury what is presumed".

Pg. 546: "Our conclusion is that, at least in those cases where the facts are fully developed by eye witnesses, instructions on presumption of intent and malice should not be given".

---

166 O. S. 138, *Ayers* v. *Woodward* (1 O. O. 2d).

Syl. 3 . . . "Where a litigant introduces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such evidence, the presumption never arises and the case must be submitted to the jury with-

out any reference to the presumption in either a special instruction or a general charge".

Again the Court said in its charge (B. of Ex. pg. 113):

> "The test is whether or not the defendant had some degree of possession and control over the material alleged in the indictment",

Thus the jury were left to speculate as to what "some degree"—made the criminal possession and control intended by the law. Such a charge is held invalid again and again. We quote some of the cases:

> "Defendant was charged with keeping and having intoxicating liquor in her possession. *The Court instructed the jury that possession means 'some right, power or control over the corporeal thing. Held the* [fol. 134] *definition of possession was inadequate.*"

(The Facts . . . The boarders had access to the cellar . . . search warrant—5 quarts of whiskey hidden behind the fruit jars in the cellar. In room upstairs found an empty quart bottle which had contained wine which the occupant of the room had just finished drinking,—Smardy left without paying for his board)

" . . . Defendant could not be held responsible for liquor placed in her house by others surreptitiously or without her knowledge or consent.

The word "some", in the instruction given, specified nothing respecting the nature of the "right, power or control" essential to possession. . . .

. . . if defendant knew Smardy was a bootlegger, and was hiding his whiskey somewhere behind the fruit jars in her cellar, those facts alone would not make her guilty of possession of liquor. (italics ours)"

In 283 Pac. 630, *State* v. *Stewart*, a similar instruction held invalid.

III. The sentence of seven years in every event violates the Constitution of Ohio.

As we have shown, Dollree Mapp was not guilty of any crime. It could not have been the intent of the Legislature

that a woman in the position of the defendant should be sent to the penitentiary for seven years for failure to [fol. 135] destroy the articles of her roomer, which it was expected were to be called for. We say that if a mere holding under such circumstances makes one subject to so severe a penalty, that the law would be unconstitutional.

In Article 1, Section 9 of the Constitution of the State of Ohio, it is provided: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted".

We have shown that the current ordinances as reflected in 6 O. O. (2d), 313, *City of Cincinnati* v. *King*, impose merely a fine of $100.00 or 60 days, even for possession of such obscene literature for sale.

We have shown above that the present statute of Ohio is rare and unusual. A test of whether a punishment is cruel and unusual is laid down by the Supreme Court of U. S. in 217 United States 349, and we quote some of the syllabi therefrom.

217 U. S. 349, *Weems* v. *U. S.*

> "In determining whether a punishment is cruel and unusual as fixed by the Philipine Commission, the Court will consider the punishment of the same or similar crimes in other parts of the U. S. as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitation formed to establish justice.
>
> Where the minimum sentence which the Court might impose is cruel and unusual within the prohibition of a Bill of Rights, the fault is in the law and not in the sentence, and if there is no other law under which sentence can be imposed, it is the duty of the Court to declare the law void.
>
> [fol. 136] Where the sentence cannot be imposed under any law except that declared unconstitutional or void, the case cannot be remanded for new sentence . . . but the judgment must be reversed with direction to dismiss the proceeding."

We give also some additional cases as to what is a cruel and unusual punishment in contravention of the Constitution.

55 Atl. (2d) 883, *N. J. Mayor etc.* v. *Bauer.*

Syl. 4: "An Ordinance forbidding ownership without a license of automatic gum vending machine and subjecting violators to $24,600 fine or 30 years in jail for a 4 months' offense is invalid as providing "cruel and unusual punishment" in contravention of the 8th amendment and N. J. Constitution."

254 N. Y. S. 786, *People* v. *Betts.*

Syl. 2: "Jail sentence imposed for driving while intoxicated held contrary to constitutional provisions prohibiting cruel and unusual punishment, where defendant's shaken condition was due to his having suffered concussion of brain in accident.

"A free man shall not be amerced for a small offense, but only according to the degree of the offense; and for a great delinquency, according to the magnitude of the delinquency saving his contentment." (quoted by Court)

"Resort has been had to ancient precedents because they breathe the spirit of a time when man was groping for liberty and endeavoring to throw off the shackles which bound him. Our present machine age begets machine thinking and hence all of the latter day preachments counsel dumb and ox-like submission to the oppressor's yoke."

• • • • • • •

[fol. 137]

IN THE COURT OF APPEALS OF CUYAHOGA COUNTY

No. 24699

STATE OF OHIO, Plaintiff-Appellee,

—vs.—

DOLLREE MAPP a.k.a. DOLLY MAPP, Defendant-Appellant.

JOURNAL ENTRY—March 28, 1959

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties. Defendant found guilty of violation of Section 2905.34 R.C. by the jury upon which judgment was entered. Defendant complains particularly of error in charge and complains of sentence imposed. Upon review of the entire case, we find no error prejudicial to the rights of the defendant. (Section 2945.83 R.C.) The question of punishment is within the exclusive jurisdiction of the trial court. The judgment of the Court of Common Pleas is therefore affirmed. It is ordered that appellee recover of appellant his costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

(Signature illegible), Presiding Judge.

Approved:

Gertrude B. Mahon, Attorney for Plaintiff-Appellee.
A. L. Kearns, Attorney for Defendant-Appellant.

[fol. 138]

IN THE SUPREME COURT OF OHIO

Case No. 36091

STATE OF OHIO, Plaintiff-Appellee,

—v.—

DOLLREE MAPP, Defendant-Appellant.

Action:

Appeal from the Court of Appeals of Cuyahoga County.

Motion for Leave to Appeal from the Court of Appeals of Cuyahoga County.

Attorneys:

John T. Corrigan, Prosecuting Attorney; Gertrude B. Mahon, Asst. Pros. Atty., Court House, Cleveland, Ohio.

Kearns, Greene & Greene; A. L. Kearns, Hippodrome Bldg., Cleveland, Ohio.

MEMORANDA OF PLEADINGS, &c., FILED, WRITS ISSUED, &c., JUDGMENTS, ORDERS AND DECREES

Date	
April 24, 1959	Notice of Appeal, Motion for Leave to Appeal and proof of service filed.
April 24, 1959	Court of Appeals Transcript of Docket and Journal Entries. Original Papers and Bill of Exceptions filed.
April 30, 1959	Entry extending time for filing appellant's brief to May 27, 1959. Carl V. Weygandt, Chief Justice, Journal 43, page 114.
May 27, 1959	Assignment of errors and appellant's printed brief filed.

Date	
May 27, 1959	Cause docketed on appeal as of right.
June 11, 1959	Appellee's printed brief filed. Proof of service filed.
June 13, 1959	Motion by appellee to dismiss appeal as of right.
September 11, 1959	Appellant's printed reply brief and proof of service filed.
October 7, 1959	Motion by Appellee to dismiss appeal as of right—overruled. Journal 43, page 223.
[fol. 139]	
October 7, 1959	Motion for Leave to Appeal from the Court of Appeals of Cuyahoga County —Allowed. Journal 43, page 223.
October 7, 1959	Letter advising allowance of motion for leave issued.
October 15, 1959	Assignments of Error and Appellant's printed brief refiled and proof of service filed.
October 15, 1959	Cause stands for hearing on appeal as of right.
October 24, 1959	Application of Ohio Civil Liberties Union for Leave to file brief amicus curiae herein filed.
October 26, 1959	Entry granting Fred J. Livingstone leave to file brief amicus curiae on behalf of Ohio Civil Liberties Union on or before December 15, 1959. Carl V. Weygandt, Chief Justice, Journal 43, page 247.
October 26, 1959	Appellee's printed brief on motion refiled and proof of service filed.

Date	
December 15, 1959	Printed brief amicus curiae of Ohio Civil Liberties Union filed. 12/16/59 Proof of Service filed.
January 11, 1960	Defendant's Exhibits A, B & C and State's Exhibits 1 to 13, Inc. filed.
March 23, 1960	Judgment affirmed. Journal 43, page 410.
March 29, 1960	Notified application for rehearing to be filed.
April 4, 1960	Application for rehearing filed.
April 13, 1960	Rehearing denied. Journal 43, page 430.
April 13, 1960	Mandate issued.
April 22, 1960	Application for stay of execution, proof of service and consent filed.
April 26, 1960	Application for stay of execution granted. Carl V. Weygandt, Chief Justice, Journal 43, page 445.
April 26, 1960	Certified copy of entry staying execution sent to A. L. Kearns.
June 15, 1960	Notice of Appeal to United States Supreme Court filed.
June 30, 1960	Original papers and Bill of Exceptions sent to Mr. Greene. Exhibits retained.
July 19, 1960	Exhibits sent to Clerk of Courts.
July 25, 1960	Acknowledgment of Exhibits received and filed.

[fol. 140]

IN THE SUPREME COURT OF OHIO

JOURNAL ENTRIES

Journal 43, Page 114
Entry

Upon application of appellant and for good cause shown, it is ordered that the time for filing appellant's brief on motion herein be, and the same hereby is, extended to May 27, 1959. /s/ Carl V. Weygandt, Chief Justice.

Journal 43, Page 223
Motion by Appellee to Dismiss Appeal as of Right.
Cuyahoga County.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal 43, Page 223
Motion for Leave to Appeal From the Court of Appeals of Cuyahoga County.

It is ordered by the Court that this motion be, and the same hereby is, allowed.

Journal 43, Page 247
Entry

Upon application and for good cause shown, it is ordered that Fred J. Livingstone is hereby given leave to file brief amicus curiae herein on behalf of Ohio Civil Liberties Union on or before December 15, 1959. /s/ Carl V. Weygandt, Chief Justice.

Journal 43, Page 410
Appeal From the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby,

affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $ .....

Ordered, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

[fol. 141]
Journal 43, Page 430
Application for Rehearing

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Journal 43, Page 445
Entry

This cause having come on to be heard this 26th day of April, 1960, upon the motion of Dollree Mapp for a stay of execution.

The Court being fully informed of the cause and reasons set forth in said motion and upon due consideration thereof, finds that said motion should be granted.

It is therefore ordered, judged and decreed that execution of the sentence passed upon the Defendant, Dollree Mapp, Appellant, by the Court of Common Pleas of Cuyahoga County, Ohio, be stayed until further order of this Court and that the bond now in full force and effect heretofore issued and furnished by the said Defendant, Dollree Mapp, which said bail bond is now of record in this matter, shall remain in full force and effect until further order of this Court. /s/ Carl V. Weygandt, Chief Justice.

[fol. 142]

IN THE SUPREME COURT OF OHIO

ASSIGNMENTS OF ERROR—Filed May 27, 1959

Defendant-Appellant, for her Assignments of Error herein, says that on or before the 4th day of September, 1958, in the Court of Common Pleas of Cuyahoga County, Criminal Branch No. 68,326 the defendant was found guilty by a jury on an indictment under R. C. 2905.34, charging possession "of certain lewd books and pictures," the conviction and sentence to the Ohio Reformatory for Women (7 years) was appealed to the Court of Appeals, which affirmed; all of which more fully appears by the transcript, docket and journal entries and original papers filed herewith and made a part hereof.

Said Court of Appeals erred in the following respects:

The judgment of the Court of Appeals should have been a reversal of the judgment of the Court of Common [fol. 143] Pleas and a discharge of the defendant upon the grounds that:

1. The alleged crime charged in the indictment was not supported by the evidence;

2. The Court of Common Pleas erred in its instructions to the jury to which objection and exceptions were duly made.

3. Defendant-appellant, by the charge of the Court, was deprived of her right to trial by jury, in violation of Article I, Bill of Rights, Paragraph 5, Constitution of Ohio.

4. Defendant-Appellant's sentence, at all events, was in violation of Article I, Bill of Rights, Paragraph 9. Constitution of Ohio, to wit: "Nor cruel and unusual punishments inflicted."

5. R. C. 2905.34, Ohio, under which this defendant was indicted, tried, convicted and sentenced is unconstitutional and deprived defendant-appellant of her rights and liberty

in violation of Article I, para. 1 of the Bill of Rights of Ohio;—Article I, para. 9 of the Bill of Rights of Ohio;—and Amendment XIV, Section 1 of the Constitution of the United States.

6. The trial, conviction, and sentence of the defendant-appellant, and the affirmance thereof by the Court of Appeals, as revealed by the acts of the prosecution, and the police officers entering into appellant's premises and their conduct thereafter, and the production of the papers, books, pictures etc., as evidence was contrary to the rights of the defendant in violation of Article I, paragraphs 1 and 14 of the Bill of Rights of the Constitution of Ohio, and Amendment XIV, Section 1 of the Constitution of the United States.

[fol. 144] 7. In refusing to review the sentence imposed by the Court of Common Pleas, upon the ground that the Court of Appeals has no jurisdiction to review the sentence, contrary to Article IV, para. 6 of the Constitution of the State of Ohio, and the statutes thereof.

8. Other errors appearing on the record.

Wherefore, defendant-appellant herein prays that the judgment of affirmance in the Court of Appeals be reversed and set aside, to the end that the judgment and sentence of the Court of Common Pleas be reversed and set aside, and that there be rendered the judgment which should have been rendered, to wit: an acquittal and judgment for the defendant; and that she be restored to all that she has lost.

[fol. 145]

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, Appellee.

—v.—

MAPP, Appellant.

Criminal law—Knowingly possessing obscene literature—Section 2905.34, Revised Code—Evidence—Sufficient to convict—Obscene literature unlawfully seized during unlawful search—Appeal—Constitutionality of statute—Affirmance of conviction.

1. Assuming the constitutional validity of the part of Section 2905.34, Revised Code, which prohibits any person from knowingly having in his possession or under his control lewd or lascivious books and pictures, a defendant may be convicted thereunder where the evidence discloses that, in packing up the belongings of a former roomer in such defendant's home, such defendant found lewd and lascivious books and pictures and packed them with such former roomer's other belongings for the purpose of storing them for him until he came for them.

2. A conviction thereunder may be valid although that conviction is based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's [fol. 146] home, where it does not appear that such evidence was taken from defendant's person by the use of brutal or offensive force against defendant. (*State* v. *Lindway*, 131 Ohio St., 166, followed.)

3. Where a majority of less than six members of the Supreme Court are of the opinion that the portion of a statute upon which a conviction is based is unconstitutional and void but no other reversible error appears in the record, a judgment of the Court of Appeals sustaining such conviction must be affirmed. (Section 2 of Article IV of the Constitution applied.)

OPINION—Decided March 23, 1960

Appeal from the Court of Appeals for Cuyahoga County.

Defendant was indicted for "unlawfully and knowingly" having "had in her possession and under her control, certain lewd and lascivious books, pictures and photographs."

This indictment was based upon Section 2905.34, Revised Code, which reads in part:

"No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print, [or] picture * * *.

"Whoever violates this section shall be fined not less than $200 nor more than $2,000 or imprisoned not less than one nor more than seven years, or both."

The verdict of the jury found the defendant "guilty of possession of obscene literature as charged in the indictment." Defendant's motion for a new trial was overruled and the Common Pleas Court rendered judgment sentencing defendant to imprisonment in the Ohio Reformatory for Women for an indeterminate period.*

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is now before this court on appeal from the judgment of the Court of Appeals.

[fol. 147] Mr. John T. Corrigan, prosecuting attorney, and Mrs. Gertrude Bauer Mahon, for appellee.

Mr. A. L. Kearns, for appellant.

TAFT, J.:

The books and pictures in evidence in the instant case clearly represent, and the undisputed evidence in the record indicates, that defendant knew at the time she is charged with having possessed them that they represented lewd and

* Section 5143.05, Revised Code, reads in part:

"Courts imposing sentences to the reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment shall be terminated by the Pardon and Parole Commission * * * but * * * shall not exceed the maximum term, nor be less than the minimum term provided for such felony."

lascivious books and pictures. However, defendant contends that they were not "in [her] possession or under [her] control" within the meaning of the words of Section 2905.34, Revised Code.

Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings with the purpose of storing them until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police.

In our opinion, this evidence of defendant establishes that she had these books and pictures "in * * * [her] possession or under * * * [her] control" within the meaning of those words as used in Section 2905.34, Revised Code.

Her evidence clearly discloses that defendant not only took possession and control of the room which she had rented but also of the belongings of her former tenant, including the books and pictures which the undisputed evidence shows that she knew to be lewd and lascivious.

Hence, it follows that, if the portion of Section 2905.34, Revised Code, that was applied in the instant case, is not unconstitutional and void, then, even if we assume that there were errors in the trial court's charge as defendant argues, such errors could not have prejudiced defendant. It be-[fol. 148] comes necessary therefore to consider whether the constitutional questions raised require a reversal of the judgment under review.

Defendant contends that the due process clause of the 14th Amendment to the Constitution of the United States was violated by her conviction for possession and control of these books and pictures since that conviction was based primarily upon their unlawful seizure from her during an unlawful search of her home.

There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's

home. No warrant was offered in evidence, there was no testimony as to who issued any warrant or as to what any warrant contained, and the absence from evidence of any such warrant is not explained or otherwise accounted for in the record. There is nothing in the record tending to prove or from which an inference may be drawn, and no one has even suggested that any warrant that we may assume that there may have been described anything other than policy paraphernalia as things to be searched for. Our statute (Section 2933.24, Revised Code) requires a search warrant to "particularly describe the things to be searched for." See also Section 2905.35, Revised Code. Our Constitution (Section 14 of Article I) specifically forbids the issuance of any such warrant except "upon probable cause, supported by oath or affirmation, . particularly describing the place to be searched * * * and things to be seized." Admittedly therefore there was no warrant authorizing a search of defendant's home for any "lewd, or lascivious book * * * print, [or] picture."

However, this court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution. *State* v. *Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490 (appeal dismissed and certiorari denied, 299 U. S., 506, 81 L. Ed., 375, 57 S. Ct., 36); and the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding. *Wolf* v. *Colorado*, 338 U. S., 25, 93 L. Ed., 1782, 69 S. Ct., 1359, *Stefanelli* v. *Minard*, 342 U. S., 117, 96 L. Ed., 138, 72 S. Ct., 118. Subsequently, in *Rochin* v. *California*, 342 U. S., 165, 96 L. Ed., 183, 72 S. Ct., 205, 25 A. L. R. [fol. 149] (2d), 1396, that court held that a conviction, obtained primarily by introducing in evidence narcotics seized not only during an illegal search but by means of a physical assault upon the defendant, violated the due process clause. Although there are statements in the majority opinion in that case which will support a reasonable argument that the conviction in the instant case should be set aside because the "methods" employed to obtain the books and pictures were such as to "offend 'a sense of justice,'" later decisions have refused to follow that case in instances not involving the acquisition of incriminating evidence by the

use of "'brutal' or 'offensive'" physical force against the person of the defendant. *Breithaupt* v. *Abram, Warden*, 352 U. S., 432, 1 L. Ed., (2d), 448, 77 S. Ct., 408. See also *Irvine* v. *California*, 347 U. S., 128, 98 L. Ed., 561, 74 S. Ct., 381 (evidence obtained by use of microphone illegally placed in defendant's home). Annotations 93 L. Ed., 1797, 96 L. Ed., 145, 98 L. Ed., 581, 100 L. Ed., 239, 50 A. L. R. (2d), 531. There is no evidence that any of the incriminating evidence in the instant case was taken from defendant's person by the use of brutal or offensive physical force against defendant.

Hence, we conclude that, if the portion of Section 2905.34, Revised Code, applied in the instant case is valid, the due process clause of the 14th Amendment to the Constitution of the United States was not violated by defendant's conviction, although that conviction was based primarily upon the introduction in evidence of books and pictures unlawfully seized during an unlawful search of defendant's home.

The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. Ed. (2d), 2211. That annotation does not indicate that there is any case decided by a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, ex-
[fol. 150] hibiting or publishing. Under our statute as now worded, mere possession is forbidden even where the possessor does not have a purpose of again looking at the books or pictures; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner. Cf. *Lambert* v. *California*, 355 U. S., 225, 2 L. Ed. (2d), 228, 78 S. Ct., 240, *Weems* v. *United States*, 217 U. S., 349, 54 L. Ed., 793, 30 S. Ct., 544.

If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him and, while doing that, necessarily learned of their lewd and lascivious character, then at that instant she had "in" her "possession" and "under" her "control" a "lewd or lascivious book * * * print [or] picture" as prohibited by this statute.

If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.

Smith v. *California* (1959), U. S., , 4 L. Ed. (2d), 205, 80 S. Ct., 215, held invalid a legislative provision that made it "unlawful for any person to have in his possession any obscene or indecent writing, [or] book * * * in any place of business where * * * books * * * are sold or kept for sale."

In the court's opinion by Mr. Justice Brennan it is said:

"We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth* v. *United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct., 1304. * * * our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to [fol. 151] have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. * * * if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The

bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

It may be argued that the legislation involved in the instant case, unlike that involved in the *Smith case*, requires *scienter* because it only makes it unlawful to *"knowingly* * * * have * * * possession." However, this legislation is analogous in its effect to that in the *Smith case*. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. *Benjamin* v. *City of Columbus*, 167 Ohio St., 103, 146 N. E. (2d), 854, where no question of freedom of press involved.

In the opinion of Judges Taft, Bell, Herbert and Peck, the portion of Section 2905.34, Revised Code, upon which defendant's conviction was based, is constitutionally invalid, and, for that reason, the judgment of the Court of Appeals [fol. 152] should be reversed. However, Section 2 of Article IV of the Constitution of Ohio reads in part:

"No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of this court are of the opinion that no portion of the statute upon which defendant's conviction was based is unconstitutional and void, the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

ZIMMERMAN and PECK, JJ., concur:

MATTHIAS, J., concurs in paragraphs two and three of the syllabus and in the judgment.

WEYGANDT, C. J., concurs in the judgment.

BELL and HERBERT, JJ., concur in paragraphs one and three of the syllabus but dissent from paragraph two thereof and from the judgment.

HERBERT, J., dissenting:

Although I concur in paragraphs one and three of the syllabus, I must dissent from paragraph two which follows *State* v. *Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490, and the judgment. The facts are sufficiently stated in the majority opinion.

Section 14, Article I of the Ohio Constitution, provides:

"The right of the people to be secure in their persons, houses, papers, and possession, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The judgment in the *Lindway case* is not in conflict with this constitutional provision. Had I been a member of this court at that time I would have joined in the judgment as all the members of the court then did because the evidence there clearly established that the defendant was operating a bomb manufacturing shop in the basement of that house. [fol. 153] As stated by Jones, J., in the concurring opinion in that case:

"This defendant was suspected of manufacturing bombs and of being engaged in the nighttime bombing of the homes of employees of a manufacturing company. If the search produced evidence of his projected crime, the evidence should have been admitted; for neither Constitution nor state law was intended to provide security for such dangerous enemies to our public peace."

The foregoing sentence contains ample legal foundation and justification for the judgment affirming the conviction

there. As to that portion of the syllabus, however, relating to evidence obtained by an unlawful search—in which only a bare majority concurred—it seems to me to be far too comprehensive and susceptible to abuse by police and prosecution authorities. As a rule, abuses by such officials rarely occur but when they do the constitutional rights of the private citizen should be fully protected. The broad scope of the rule relating to evidence obtained by an unlawful search, as stated in the *Lindway* syllabus, leads me to the inescapable conclusion that in too many instances it virtually sterilizes the constitutional guarantees provided by Section 14, Article I.

On the basis of the constitutionality of Section 2905.34, Revised Code, which is fully discussed and disposed of in the majority opinion, this case seems to me to afford a perfect opportunity for the court to modify and limit the *Lindway* rule in the direction indicated by Jones, J., so as to bring it into accord with a more reasonable interpretation of the above-quoted provision of the Constitution and the requirements of the statutes enacted to implement it.

Section 13035, General Code (now Section 2905.34, Revised Code), provided, from 1910 to 1939, as follows:

"Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession *for such purpose*, an obscene, lewd or lascivious book * * *." (Emphasis added.)

In fact, the emphasized words read "for any such purpose" from 1894 until 1910.

[fol. 154] In 118 Ohio Laws, 420 (1939), the emphasized words were stricken and the words, "or has under his control," were inserted in their place.

In 120 Ohio Laws, 230 (1943), the word, "knowingly," was inserted after the opening word, "whoever." In the same act, Section 13035-1, General Code (now Section 2905.35, Revised Code), was passed, providing for the issuance of search warrants for suspected violation of the preceding section and also providing for the disposition of articles seized under such warrants. The last sentence of this search-warrant statute now reads:

"The magistrate shall immediately transmit every article seized by virtue of the warrant, to the prosecuting attorney, who shall, upon conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had."

Ironically enough, there being no evidence of the issuance of a search warrant for obscene books, the provisions of this last sentence are not applicable to the disposition of the evidence in the instant case.

In addition to the specific provisions of Section 2905.35, Revised Code, Section 2933.21, Revised Code, provides:

"A judge of a court or a magistrate may, within his jurisdiction, issue warrants to search a house or place:

"• • •

"(D) For books, pamphlets, ballads, or printed papers containing obscene language, prints, pictures • • • and for obscene, lewd, indecent, or lascivious drawings, lithographs, engravings, pictures • • •."

This provision has been in substantially the same form since 1876.

In the light of the *Lindway* rule and the decision in this case, one may well ask why the Legislature in 1943 enacted Section 13035-1, General Code (now Section 2905.35, Revised Code), particularly in view of the fact that Section 2933.21 (D), Revised Code, has for many years provided for search warrants in such cases.

[fol. 155] Under the principle stated by Jones, J., in his concurring opinion in *Lindway*, a conviction could well be sustained in this case if books had been discovered in the home of defendant in quantities indicating a purpose to sell, lend, give away, exhibit or offer to do so (see "for such purpose," *supra*), but on the facts here it seems to the writer that the constitutional right of this defendant "to be secure • • • against unreasonable searches and seizures" was violated.

It is a basic principle that laws restraining the fundamental liberties of the individual must have as their founda-

tion a broad basic public need which overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in evidence in the present case is and should be against public morals and policy if for no other reason than that the immature mind which might be exposed to it could be greatly harmed, I cannot agree that mere private possession of such literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual. Does the state have the power to prohibit the possession of chemistry books because from such books one might learn how to make a bomb or poisonous gas? Is the possession of medical books by a layman to be banned because of the possibility that he might learn about abortion and perhaps put such knowledge to use?

The foregoing paragraph is perhaps more applicable to a discussion of the constitutionality of Section 2509.34, Revised Code, than to the issue on which I dissent, but, since under another provision of the Constitution a bare majority of this court is powerless to invalidate the portion of that section under which the defendant was convicted, we certainly should scan carefully the method by which the evidence was acquired for such conviction. I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of their criminal use or a sufficient volume of books to indicate the [fol. 156] purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home from unlawful search and seizure had been lost by her own conduct (as in the *Lindway case* where a bomb factory was discovered), but on the undisputed facts, as disclosed in this record, I cannot so conclude. See, also, paragraph two of the syllabus in *Ciano* v. *State*, 105 Ohio St., 229, 137 N. E., 11.

As disclosed in 50 A. L. R. (2d), 531, the states are now about evenly divided between the extremes of the so-called federal rule on search and seizure and the rule as stated in *Lindway*, indicating a trend away from the *Lindway* rule since the time of its decision.

A violator of Section 2905.34, Revised Code, may, upon conviction, be either fined, jailed or sent to the penitentiary.

As Jones, J., stated in his concurrence in the *Lindway case*: "It is not for the class of criminal element alluded to, but for the class embodying millions of citizens who are innocent of any offense or whose offenses are minor, that I urge protection under the search and seizure clause of the state Constitution. The decision of this court in the instant case is too broad, since it is made to apply to everyone suspected of committing any offense whatever. There is one advantage the occupant of a bona fide dwelling now has and always has had—he could discover whether a search warrant had in fact been issued and for, his own protection, could demand its production."

Here, the defendant did just that and the evidence is uncontradicted that she was not given an opportunity to read it, if any was issued. In fact, it was not even contended by the prosecution that a warrant was ever issued authorizing a search of her home for obscene literature. In my view, the *Lindway* rule which is being followed in this case should be modified and clarified so that there will no longer be a judicial stamp of approval on the use of unlawful means to justify an end result. Here an admittedly private home was unlawfully searched, and I cannot concur in a judgment upholding conviction based solely on evidence so obtained.

Bell, J., concurs in the foregoing dissenting opinion.

[fol. 157] Clerk's Certificate (omitted in printing).

[fol. 158]

IN THE SUPREME COURT OF THE STATE OF OHIO

Criminal Case No. 36091

THE STATE OF OHIO, Plaintiff-Appellee,

—vs.—

DOLLREE MAPP a.k.a. DOLLY MAPP, Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 15, 1960

I. Notice is hereby given that Dollree Mapp, the Appellant above named, hereby appeals to the Supreme Court of the United States from a final order of the Supreme Court of the State of Ohio entered herein on the 23rd day of March, 1960, affirming the judgment of conviction of an appellate judgment of conviction of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, State of Ohio, which in turn, affirmed a judgment of conviction of the Court of Common Pleas of Cuyahoga County; although four (4) of the seven (7) judges of the Supreme Court of Ohio held that the judgment of the Court of Appeals should be reversed, because the statute under which the defendant-appellant was convicted was unconstitutional, [fol. 159] but that however, under Section 2, Article IV of the Constitution of Ohio, since more than one of the Judges of the Supreme Court of Ohio were of the opinion that the statute was constitutional, the judgment had to be affirmed.

This Appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Appellant was convicted of the crime that she "unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof" in violation of Section 2905.34, Ohio Revised Code, was sentenced from one (1) to seven (7) years confinement in the Ohio State Women's

Reformatory and is presently at large on bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00).

II. The Clerk will prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript [fol. 160] the following:

THE ENTIRE RECORD

III. The following questions are presented by this Appeal:

(a). Is Section 2905.34 Ohio Revised Code unconstitutional under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26, of the Ohio Constitution?

(b). Is Section 2905.34 Ohio Revised Code unconstitutional under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26, of the Ohio Constitution; as applied to the facts and circumstances of the case at bar?

(c). Does a sentence of seven (7) years for violation of Section 2905.34 Ohio Revised Code violate Amendment VIII of the United States Constitution; and Article I Section 9 of the Ohio Constitution?

(d). Does a sentence of seven (7) years for violation of Section 2905.34 Ohio Revised Code under the facts and circumstances of the case at bar, violate Amendment VIII of the United States Constitution; and [fol. 161] Article I Section 9 of the Ohio Constitution?

(e). Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prose-

cution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution; and Article I Section 1, and Article I Section 14 of the Ohio Constitution?

(f). Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution in holding that it could not review the sentence of the trial court?

(g). Is a charge by a court to a jury on presumption, thereby effectively depriving defendant of a trial by jury, unconstitutional under Amendment V, Amendment VI, and Amendment XIV Section 1 of the United States Constitution; and Article I Section 5, and Article I Section 10, of the Ohio Constitution?

(h). Did other charges to the jury by the Court violate Amendment V, Amendment VI, and Amendment XIV Section 1 of the United States Constitution; and Article I Section 5, and Article I Section 10 of the Ohio Constitution?

Walter L. Greene, A. L. Kearns & Walter L. Greene, 1101 Hippodrome Building, Cleveland 14, Ohio, MAin 1-4908, Attorneys for Defendant-Appellant.

[fol. 162] SERVICE

Copy of foregoing Notice of Appeal received this 14 day of June, 1960.

John T. Corrigan, Prosecuting Attorney for Cuyahoga County, Ohio, and Gertrude Bauer Mahon, Assistant Prosecuting Attorney, By John T. Corrigan, A. W.

[fol. 163]

SUPREME COURT OF THE UNITED STATES

No. 236—October Term, 1960

DOLLREE MAPP, etc., Appellant,

vs.

OHIO.

ORDER NOTING PROBABLE JURISDICTION—October 24, 1960

Appeal from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 24, 1960

ILE COPY

Supreme Court, U.S.
FILED
JUL 14 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236

STATE OF OHIO,
Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

STATE OF OHIO,
Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

REPORT OF OPINION.

The Supreme Court of Ohio, on March 23rd, 1960, rendered an Opinion which is reported in Volume 170 Ohio State Reports at page 427, wherein four (4) of the seven (7) judges of the Supreme Court of Ohio held that the judgment of the Court of Appeals should be reversed, because the statute under which the defendant-appellant was convicted was unconstitutional. However, Section 2 of Article IV of the Constitution of Ohio reads in part:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of the Supreme Court of Ohio were of the opinion that no portion of the Statute upon which defendant's conviction was based was

unconstitutional and void, the judgment of the Court of Appeals affirming the judgment of the Common Pleas Court had to be affirmed. This Opinion is marked Appendix "A," and is attached hereto and made a part hereof.

JURISDICTIONAL GROUNDS.

The Appellant was convicted of the crime that she "unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof" in violation of Section 2905.34, Ohio Revised Code (Appendix "B"), and was sentenced from one (1) to seven (7) years confinement in the Ohio State Womens Reformatory and is presently at large on bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00). The judgment and sentence was appealed to the Court of Appeals, which on the 31st day of March, 1959, affirmed the judgment and sentence of the Common Pleas Court. This ruling was appealed to the Supreme Court of Ohio, which Supreme Court affirmed the decision of the Court of Appeals on March 23rd, 1960, the Opinion being attached to this Brief and made a part hereof and marked Appendix "A." This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

Final judgment was rendered in the Ohio State Supreme Court affirming the decision of the lower Court on March 23rd, 1960. An Application for Re-Hearing was denied on April 13th, 1960. The Notice of Appeal to this Court was filed in the Supreme Court of Ohio on June 15th, 1960.

Jurisdiction in matters of this kind is conferred upon this Court by 28 U. S. C. Section 1257 (2).

The following cases sustain the position of the defendant-appellant that this Court has jurisdiction to hear this appeal:

Smith v. California (1959), ____ U. S. ____, 4 L. Ed. (2d) 205; 80 S. Ct. 215;
Winters v. New York, 333 U. S. 507;
Roth v. United States, 354 U. S. 476, 1 L. Ed. (2d) 1498; 77 S. Ct. 1304;
Weems v. United States, 217 U. S. 349;
Butler v. Michigan, 352 U. S. 380; 77 S. Ct. 524 (1957);
Frank v. Maryland, 79 S. Ct. 804 (1959);
Roof v. Colorado, 338 U. S. 25; 69 S. Ct. 1359;
Presont v. United States, 281 Fed. 131;
Marisette v. United States, 342 U. S. 246;
State v. Kimbro, 46 S. E. (2d) 273, Syl. 3;
Southwestern Bell Telephone Co. v. Oklahoma, 58 S. Ct. 528;
Demorest v. City Bank Farmers Trust Co., 64 S. Ct. 384;
Hague v. Committee For Industrial Organization, 59 S. Ct. 954.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

We question the validity and constitutionality of Section 2905.34 Ohio Revised Code, which has been printed in Page's Ohio Revised Code, Annotated, Title 29 (1959 Supplement) and which is fully set forth in Appendix "B" attached hereto and made a part hereof, together with the other pertinent portions of the Federal Constitution, the Ohio Constitution and other Ohio Statutes.

QUESTIONS PRESENTED BY THIS APPEAL.

The questions presented by this Appeal are as follows:

(a) Is Section 2905.34 Ohio Revised Code unconstitutional, and particularly, is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26 of the Ohio Constitution?

(b) Does a sentence of seven (7) years for violation of Section 2905.34 Ohio Revised Code violate Amendment VIII of the United States Constitution and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

(c) Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, and Article I Section 14, of the Ohio Constitution?

(d) Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution holding that it could not review the sentence of the trial court?

(e) Is a charge by a Court to a jury on presumption, thereby effectively depriving defendant of a trial by a jury and did other charges by the Court to the jury violate Amendment V, Amendment VI, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5, and Article I Section 10, of the Ohio Constitution?

STATEMENT OF THE CASE.

On the 23rd day of May, 1957, police officers, without the benefit of a search warrant, ostensibly looking for an individual who was wanted in connection with an extortion bombing, forced their way into defendant's private residence, which was the upper portion of a two-family house. Twelve (12) police officers had surrounded the private residence of the defendant where she lived with her 13-year old daughter and forced their way into it. Upon demand of a search warrant, a piece of paper was held before the defendant without giving her an opportunity to view or read same. She was then handcuffed to the banister of the stairway while the search of her private residence was made. This alleged search warrant was never proved or even tendered in the trial court upon request of the defendant. Nor was there any evidence introduced that any search warrant was ever issued.

Thereafter, the police officers, frustrated in their attempt to find any individual involved in an extortion bombing, illegally and in violation of defendant's constitutional rights, searched her private dwelling, and found lewd and lascivious documents belonging to a former roomer. The evidence showed that these documents were found by the defendant while she was cleaning a room which had been vacated by the former roomer. She stored these documents until such a time as the roomer would have returned to claim his property. It was for possession of the *roomer's* documents that the defendant was convicted of violation of Section 2905.34 Ohio Revised Code, and sentenced to from one (1) to seven (7) years in the Ohio State Womens Reformatory. Perversely, under Section 2909.01 Ohio Revised Code, had the defendant de-

stroyed the documents instead of storing them, she would have been liable to a sentence from one (1) to seven (7) years imprisonment. That Section reads in part as follows:

> "No person shall maliciously destroy or injure property not his own.
>
> Whoever violates this section shall be imprisoned not less than one (1) or more than seven (7) years if the value of the property destroyed or the injury done, is One Hundred Dollars ($100.00) or more * * *."

The question of the constitutionality of Section 2905.34 was raised in the Court of Appeals in the "Argument" of the Brief of Defendant-Appellant, and then again in the Supreme Court of Ohio in the "Assignments of Error" and "Questions of Law." The question of the constitutionality of the sentence of seven (7) years for violation of Section 2905.34 was raised in the "Motion For New Trial" in the trial Court and in the Court of Appeals in the "Discussion" and then again in the Supreme Court of Ohio under "Assignments of Error" and "Questions of Law." The matter of the conduct of the police in procuring the evidence was first raised in the trial court on a "Motion To Suppress" filed September 3rd, 1958, then again in the Court of Appeals in the "Statement of Facts," and then again in the Supreme Court of Ohio in the "Assignments of Error" and "Questions of Law." The question of whether or not the Court of Appeals of Ohio violated the Ohio Constitution was raised in the Supreme Court in the "Assignments of Error" and "Questions of Law." The matter of the Court's charge to the jury was raised in the Court of Appeals in the "Discussion" of defendant-appellant's Brief, and again in the Supreme Court in the "Assignments of Error" and "Questions of Law."

The Court of Appeals wrote a brief Journal Entry affirming the lower Court's judgment, which Journal Entry is marked Appendix "C," attached hereto and made a part hereof as if fully rewritten herein. This Journal Entry did not dispose of the individual items with particularity. The Supreme Court of Ohio wrote an Opinion which affirmed the two (2) lower court rulings, but clearly indicated that a majority of the Supreme Court felt that the judgments of the lower courts should be reversed. This Opinion is marked Appendix "A" and attached hereto and made a part hereof as if fully rewritten herein. In the Opinion of the Supreme Court of Ohio, four (4) of the seven (7) judges held that the Statute was unconstitutional, but that by virtue of Section 2 Article IV of the Ohio Constitution, four (4) of the seven (7) judges of the Supreme Court of Ohio were insufficient in number to reverse the judgment on that basis. In a further dissenting opinion written by Justice Herbert, and concurred in by Justice Bell, they indicated that in addition to a reversal on the unconstitutionality of the Statute, the judgment should be reversed by virtue of the unconstitutional and unlawful action of the police officers in obtaining the evidence upon which a conviction was obtained.

The Federal questions raised by this appeal are substantial for the following reasons:

The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual "to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional

rights of the individual" (Justice Herbert's dissenting Opinion, Appendix "A"). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code are read together, which Statutes are set forth in Appendix "B", they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the defendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions.

Respectfully submitted,

A. L. KEARNS & WALTER L. GREENE,
Attorneys for Defendant-Appellant.

APPENDIX "A."

OPINION OF THE SUPREME COURT OF OHIO.

Defendant was indicted for "unlawfully and knowingly" having "had in her possession and under her control, certain lewd and lascivious books, pictures and photographs."

This indictment was based upon Section 2905.34, Revised Code, which reads in part:

"No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print, [or] picture * * *

"Whoever violates this section shall be fined not less than $200 nor more than $2,000 or imprisoned not less than one nor more than seven years, or both."

The verdict of the jury found the defendant "guilty of possession of obscene literature as charged in the indictment." Defendant's motion for a new trial was overruled and the Common Pleas Court rendered judgment sentencing defendant to imprisonment in the Ohio Reformatory for Women for an indeterminate period.*

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is now before this court on appeal from the judgment of the Court of Appeals.

TAFT, J. The books and pictures in evidence in the instant case clearly represent, and the undisputed evidence in the record indicates, that defendant knew at the time

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* Section 5143.05, Revised Code, reads in part:

"Courts imposing sentences to the reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment shall be terminated by the Pardon and Parole Commission * * * but * * * shall not exceed the maximum term, nor be less than the minimum term provided for such felony."

she is charged with having possessed them that they represented lewd and lascivious books and pictures. However, defendant contends that they were not "in [her] possession or under [her] control" within the meaning of the words of Section 2905.34, Revised Code.

Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings with the purpose of storing them until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police.

In our opinion, this evidence of defendant establishes that she had these books and pictures "in * * * [her] possession or under * * * [her] control" within the meaning of those words as used in Section 2905.34, Revised Code.

Her evidence clearly discloses that defendant not only took possession and control of the room which she had rented but also of the belongings of her former tenant, including the books and pictures which the undisputed evidence shows that she knew to be lewd and lascivious.

Hence, it follows that, if the portion of Section 2905.34, Revised Code, that was applied in the instant case, is not unconstitutional and void, then, even if we assume that there were errors in the trial court's charge as defendant argues, such errors could not have prejudiced de-

fendant. It becomes necessary therefore to consider whether the constitutional questions raised require a reversal of the judgment under review.

Defendant contends that the due process clause of the 14th Amendment to the Constitution of the United States was violated by her conviction for possession and control of these books and pictures since that conviction was based primarily upon their unlawful seizure from her during an unlawful search of her home.

There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home. No warrant was offered in evidence, there was no testimony as to who issued any warrant or as to what any warrant contained, and the absence from evidence of any such warrant is not explained or otherwise accounted for in the record. There is nothing in the record tending to prove or from which an inference may be drawn, and no one has even suggested that any warrant that we may assume that there may have been described anything other than policy paraphernalia as things to be searched for. Our statute (Section 2933.24, Revised Code) requires a search warrant to "particularly describe the things to be searched for." See also Section 2905.35, Revised Code. Our Constitution (Section 14 of Article I) specifically forbids the issuance of any such warrant except "upon probable cause, supported by oath or affirmation, particularly describing the place to be searched * * * and things to be seized." (Admittedly therefore there was no warrant authorizing a search of defendant's home for any "lewd, or lascivious book * * * print, [or] picture."

However, this court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution. *State v. Lindway*, 131 Ohio St., 166.

2 N. E. (2d), 490 (appeal dismissed and certiorari denied, 299 U. S., 506, 81 L. Ed., 375, 57 S. Ct., 36); and the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding. *Wolf v. Colorado*, 338 U. S., 25, 93 L. Ed., 1782, 69 S. Ct., 1359, *Stefanelli v. Minard*, 342 U. S., 117, 96 L. Ed. 138, 72 S. Ct., 118. Subsequently, in *Rochin v. California*, 342 U. S., 165, 96 L. Ed., 183, 72 S. Ct., 205, 25 A. L. R. (2d), 1396, that court held that a conviction, obtained primarily by introducing in evidence narcotics seized not only during an illegal search but by means of a physical assault upon the defendant, violated the due process clause. Although there are statements in the majority opinion in that case which will support a reasonable argument that the conviction in the instant case should be set aside because the "methods" employed to abtain the books and pictures were such as to "offend 'a sense of justice,' " later decisions have refused to follow that case in instances not involving the acquisition of incriminating evidence by the use of " 'brutal' or 'offensive' " physical force against the person of the defendant. *Breithaupt v. Abram, Warden*, 352 U. S., 432, 1 L. Ed., (2d), 448, 77 S. Ct., 408. See also *Irvine v. California*, 347 U. S., 128, 98 L. Ed., 561, 74 S. Ct., 381 (evidence obtained by use of microphone illegally placed in defendant's home). Annotations 93 L. Ed., 1797, 96 L. Ed., 145, 98 L. Ed., 581, 100 L. Ed., 239, 50 A. L. R. (2d), 531. There is no evidence that any of the incriminating evidence in the instant case was taken from defendant's person by the use of brutal or offensive physical force against defendant.

Hence, we conclude that, if the portion of Section 2905.34, Revised Code, applied in the instant case is valid, the due process clause of the 14th Amendment to the Con-

stitution of the United States was not violated by defendant's conviction, although that conviction was based primarily upon the introduction in evidence of books and pictures unlawfully seized during an unlawful search of defendant's home.

The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. Ed. (2d), 2211. That annotation does not indicate that there is any case decided by court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even where the possessor does not have a purpose of again looking at the books or pictures; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner. *Cf. Lambert v. California*, 355 U. S., 225, 2 L. Ed. (2d), 228, 78 S. Ct., 240, *Weems v. United States*, 217 U. S., 349, 54 L. Ed., 793, 30 S. Ct., 544.

If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him

and, while doing that, necessarily learned of their lewd and lascivious character, then at that instant she had "in" her "possession" and "under" her "control" a "lewd or lascivious book * * * print [or] picture" as prohibited by this statute.

If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.

Smith v. California (1959), __ U. S., __, 4 L. Ed. (2d), 205, 80 S. Ct., 215, held invalid a legislative provision that made it "unlawful for any person to have in his possession any obscene or indecent writing, [or] book * * * in any place of business where * * * books * * * are sold or kept for sale."

In the court's opinion by Mr. Justice Brennan it is said:

"We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498,77 S. Ct., 1304. * * * our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. * * * if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution

of constitutionally protected as well as obscene literature. * * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

It may be argued that the legislation involved in the instant case, unlike that involved in the *Smith* case, requires *scienter* because it only makes it unlawful to "*knowingly* * * * have * * * possession." However, this legislation is analogous in its effect to that in the *Smith* case. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. *Benjamin v. City of Columbus*, 167 Ohio St., 103, 146 N. E. (2d), 854, where no question of freedom of press involved.

In the opinion of Judges Taft, Bell, Herbert and Peck, the portion of Section 2905.34, Revised Code, upon which

defendant's conviction was based, is constitutionally invalid, and, for that reason, the judgment of the Court of Appeals should be reversed. However, Section 2 of Article IV of the Constitution of Ohio reads in part:

"No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of this court are of the opinion that no portion of the statute upon which defendant's conviction was based is unconstitutional and void, the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

ZIMMERMAN and PECK, JJ., concur.

MATTHIAS, J., concurs in paragraphs two and three of the syllabus and in the judgment.

WEYGANDT, C. J., concurs in the judgment.

BELL and HERBERT, JJ., concur in paragraphs one and three of the syllabus but dissent from paragraph two thereof and from the judgment.

HERBERT, J., dissenting. Although I concur in paragraphs one and three of the syllabus, I must dissent from paragraph two which follows *State v. Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490, and the judgment. The facts are sufficiently stated in the majority opinion.

Section 14, Article I of the Ohio Constitution, provides:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable

searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The judgment in the *Lindway* case is not in conflict with this constitutional provision. Had I been a member of this court at that time I would have joined in the judgment as all the members of the court then did because the evidence there clearly established that the defendant was operating a bomb manufacturing shop in the basement of that house.

As stated by Jones, *J.*, in the concurring opinion in that case:

"This defendant was suspected of manufacturing bombs and of being engaged in the nighttime bombing of the homes of employees of a manufacturing company. If the search produced evidence of his projected crime, the evidence should have been admitted; for neither Constitution nor state law was intended to provide security for such dangerous enemies to our public peace."

The foregoing sentence contains ample legal foundation and justification for the judgment affirming the conviction there. As to that portion of the syllabus, however, relating to evidence obtained by an unlawful search—in which only a bare majority concurred—it seems to me to be far too comprehensive and susceptible to abuse by police and prosecution authorities. As a rule, abuses by such officials rarely occur but when they do the constitutional rights of the private citizen should be fully protected. The broad scope of the rule relating to evidence obtained by an unlawful search, as stated in the *Lindway* syllabus, leads me to the inescapable conclusion that in too many instances

it virtually sterilizes the constitutional guarantees provided by Section 14, Article I.

On the basis of the constitutionality of Section 2905.34, Revised Code, which is fully discussed and disposed of in the majority opinion, this case seems to me to afford a perfect opportunity for the court to modify and limit the *Lindway* rule in the direction indicated by Jones, J., so as to bring it into accord with a more reasonable interpretation of the above-quoted provision of the Constitution and the requirements of the statutes enacted to implement it.

Section 13035, General Code (now Section 2905.34, Revised Code), provided, from 1910 to 1939, as follows:

"Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession *for such purpose*, an obscene, lewd or lascivious book * * *." (Emphasis added.)

In fact, the emphasized words read "for any such purpose" from 1894 until 1910.

In 118 Ohio Laws, 420 (1939), the emphasized words were stricken and the words, "or has under his control," were inserted in their place.

In 120 Ohio Laws, 230 (1943), the word, "knowingly," was inserted after the opening word, "whoever." In the same act, Section 13035-1, General Code (now Section 2905.35, Revised Code), was passed, providing for the issuance of search warrants for suspected violation of the preceding section and also providing for the disposition of articles seized under such warrants. The last sentence of this search-warrant statute now reads:

"The magistrate shall immediately transmit every article seized by virtue of the warrant, to the prosecuting attorney, who shall, upon conviction of the person from

whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had."

Ironically enough, there being no evidence of the issuance of a search warrant for obscene books, the provisions of this last sentence are not applicable to the disposition of the evidence in the instant case.

In addition to the specific provisions of Section 2905.35, Revised Code, Section 2933.21, Revised Code, provides:

"A judge of a court or a magistrate may, within his jurisdiction, issue warrants to search a house or place:

"* * *

"(D) For books, pamphlets, ballads, or printed papers containing obscene language, prints, pictures * * * and for obscene, lewd, indecent, or lascivious drawings, lithographs, engravings, pictures * * *."

This provision has been in substantially the same form since 1876.

In the light of the *Lindway* rule and the decision in this case, one may well ask why the Legislature in 1943 enacted Section 13035-1, General Code (now Section 2905.35, Revised Code), particularly in view of the fact that Section 2933.21 (D), Revised Code, has for many years provided for search warrants in such cases.

Under the principle stated by Jones, J., in his concurring opinion in *Lindway*, a conviction could well be sustained in this case if books had been discovered in the home of defendant in quantities indicating a purpose to sell, lend, give away, exhibit or offer to do so (see "for such purpose," *supra*), but on the facts here it seems to the writer that the constitutional right of this defendant "to

be secure * * * against unreasonable searches and seizures" was violated.

It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in evidence in the present case is and should be against public morals and policy if for no other reason than that the immature mind which might be exposed to it could be greatly harmed, I cannot agree that mere private possession of such literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual. Does the state have the power to prohibit the possession of chemistry books because from such books one might learn how to make a bomb or poisonous gas? Is the possession of medical books by a layman to be banned because of the possibility that he might learn about abortion and perhaps put such knowledge to use?

The foregoing paragraph is perhaps more applicable to a discussion of the constitutionality of Section 2509.34, Revised Code, than to the issue on which I dissent, but, since under another provision of the Constitution a bare majority of this Court is powerless to invalidate the portion of that section under which the defendant was convicted, we certainly should scan carefully the method by which the evidence was acquired for such conviction. I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of

their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home from unlawful search and seizure had been lost by her own conduct (as in the *Lindway* case where a bomb factory was discovered), but on the undisputed facts, as disclosed in this record, I cannot so conclude. See, also, paragraph two of the syllabus in *Ciano v. State,* 105 Ohio St., 229, 137 N. E., 11.

As disclosed in 50 *A. L. R.* (2d), 531, the states are now about evenly divided between the extremes of the so-called federal rule on search and seizure and the rule as stated in *Lindway,* indicating a trend away from the *Lindway* rule since the time of its decision.

A violator of Section 2905.34, Revised Code, may, upon conviction, be either fined, jailed or sent to the penitentiary.

As Jones, *J.,* stated in his concurrence in the *Lindway* case: "It is not for the class of criminal element alluded to, but for the class embodying millions of citizens who are innocent of any offense or whose offenses are minor, that I urge protection under the search and seizure clause of the state Constitution. The decision of this Court in the instant case is too broad, since it is made to apply to everyone suspected of committing any offense whatever. There is one advantage the occupant of a bona fide dwelling now has and always has had—he could discover whether a search warrant had in fact been issued and for, his own protection, could demand its production."

Here, the defendant did just that and the evidence is uncontradicted that she was not given an opportunity to read it, if any was issued. In fact, it was not even contended by the prosecution that a warrant was ever issued authorizing a search of her home for obscene literature. In

my view, the *Lindway* rule which is being followed in this case should be modified and clarified so that there will no longer be a judicial stamp of approval on the use of unlawful means to justify an end result. Here an admittedly private home was unlawfully searched, and I cannot concur in a judgment upholding conviction based solely on evidence so obtained.

BELL, *J.*, concurs in the foregoing dissenting opinion.

APPENDIX "B."

Pertinent Portions of United States Constitution.

AMENDMENT IV.

"SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V.

"RIGHTS OF PERSONS.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI.

"RIGHTS OF ACCUSED.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

AMENDMENT VIII.

"PUNISHMENT FOR CRIME.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV SECTION 1.

"RIGHTS OF CITIZENS.

Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Portions of Ohio Constitution.

ARTICLE I SECTION 1.

"RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

ARTICLE I SECTION 2.

"RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

All political power is inherent in the people. Government is instituted for their equal protection and benefit. * * *"

ARTICLE I SECTION 5.

"TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.

The right of trial by jury shall be inviolate * * *."

ARTICLE I SECTION 9.

"BAILABLE OFFENSES; OF BAIL, FINE, AND PUNISHMENT.

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; *nor excessive fines imposed; nor cruel and unusual punishments inflicted.*"

ARTICLE I SECTION 10.

"TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE OF ACCUSED TO TESTIFY IN CRIMINAL CASES.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the

number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial *by an impartial jury* * * *."

ARTICLE I SECTION 14.

"SEARCH WARRANTS AND GENERAL WARRANTS.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

ARTICLE I SECTION 19.

"INVIOLABILITY OF PRIVATE PROPERTY.

Private property shall ever be held inviolate * * *."

ARTICLE II SECTION 1.

"IN WHOM LEGISLATIVE POWER IS VESTED.

The legislative power of the state shall be vested in a general assembly * * *."

ARTICLE II SECTION 26.

"WHAT LAWS TO HAVE A UNIFORM OPERATION.

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general

assembly, except, as otherwise provided in this constitution."

OF ARTICLE IV SECTION 2.

"THE SUPREME COURT.

* * * No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void * * *."

ARTICLE IV SECTION 6.

"COURTS OF APPEALS.

* * * The court of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district * * *."

Pertinent Statutes of the State of Ohio.

Section 2905.34 (13035) Selling, exhibiting and possessing obscene literature or drugs, for criminal purposes.

No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawings, representation, figure, image, cast, instrument, or articles of an indecent or immoral nature, or a

drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

Section 2905.36 (13036) Sending obscene literature by mail.

No person shall deposit in a post office, or place in charge of a person to be carried or conveyed, any of the obscene, lewd, indecent or lascivious articles or things named in Section 2905.34 of the Revised Code, or a circular, handbill, card, advertisement, book, pamphlet, or notice of the kind specified in said section, or give oral information, where, how or of whom such obscene, lewd, indecent, or lascivious articles or things can be purchased or obtained or knowingly receive any of them with intent to carry or convey, or knowingly carry or convey them, except in the United States mail.

Whoever violates this section shall be fined not less than fifty nor more than one thousand dollars or imprisoned not more than one year, or both.

2905.37 (13037) LEGITIMATE PUBLICATIONS NOT OBSCENE.

Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit.

Section 2905.38 (13038) Delivering or depositing immoral literature.

No person shall leave or place or cause to be left or placed upon the doorstep or premises owned or occupied by another, or deliver or mail to a child under sixteen years of age, printed or written matter advertising or mentioning therein a drug, nostrum, receipt, or method of treatment for venereal diseases or referring to a method of treatment purporting to restore procreative organs injured by immoral practices.

Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or

imprisoned not less than thirty nor more than one hundred days, or both, for each offense.

Section 2905.39 (13039) Printing or posting immoral pictures.

No person shall make or print in or upon his premises, or post, publish, or exhibit in or upon a building, billboard, bridge, or fence where it can be publicly seen, a picture or figure that is lascivious, indecent, immoral, or impure, or which represents crime or lust, or tends to corrupt morals, or permit such an act to be done by another in or upon his premises, building, billboard, bridge, or fence.

Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars for a first offense; for each subsequent offense, in addition to such fine, such person shall be imprisoned not less than thirty days nor more than six months.

This section does not apply to the printing and publication in book or magazine form of illustrations for scientific purposes.

Section 2909.01.

No person shall maliciously destroy or injure property not his own.

Whoever violates this section shall be imprisoned not less than one or more than seven years if the value of the property destroyed, or the injury done, is one hundred dollars or more * * *.

Section 3767.01 (C), Ohio Revised Code.

This section and Sections 2905.34, * * * 2905.37 * * * of the Revised Code shall not affect * * * any newspaper, magazine, or other publication entered as second class matter by the post-office department.

APPENDIX "C."

JOURNAL ENTRY OF THE COURT OF APPEALS.

Dated: March 31, 1959

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties. Defendant found guilty of violation of Section 2905.34 R. C. by the jury upon which judgment was entered. Defendant complains particularly of error in charge and complains of sentence imposed. Upon review of the entire case, we find no error prejudicial to the rights of the defendant. (Section 2945.83 R. C.) The question of punishment is within the exclusive jurisdiction of the trial court. The judgment of the Court of Common Pleas is therefore affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

APPENDIX "D."

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

(March 23, 1960.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $ _____.

ORDERED, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Cuyahoga County, "for entry."

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SEP 16 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM
and
BRIEF IN SUPPORT.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
GERTRUDE BAUER MAHON,
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Sec. 5143.05

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DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM.

Now comes the Appellee, the State of Ohio, and respectfully moves this Court for an order dismissing or affirming the appeal filed by the Appellant, for the reason that the appeal does not present a substantial federal question, and for the further reason that the judgment of the State court of Ohio rests on an adequate non-federal basis; and finally, for the reasons set forth in the Brief filed by the Appellee.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorney,
Attorneys for Plaintiff-Appellee.

Notice.

The Defendant-Appellant herein will take notice that the Plaintiff-Appellee is filing a Motion to Dismiss or Affirm, together with Brief, a copy of which is hereto attached.

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

GERTRUDE BAUER MAHON,

Assistant Prosecuting Attorney,

Attorneys for Plaintiff-Appellee.

BRIEF.

STATEMENT.

The defendant-appellant, hereinafter referred to as the Appellant, was charged by indictment with unlawfully and knowingly having in her possession and under her control certain lewd and lascivious books, pictures and photographs, said books, pictures and photographs being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed upon the records thereof.

On September 3d, 1958 the Appellant was tried on this charge to a jury in the Court of Common Pleas of Cuyahoga County, Ohio, and was found guilty. Execution of sentence to the Ohio Reformatory for Women was suspended pending the appeal and the Appellant is at large on bond.

The Court of Appeals of Cuyahoga County, Ohio affirmed the judgment of conviction and the Supreme Court of Ohio affirmed. The opinion of the Supreme Court of Ohio in this case is reported in 170 O. S. 427. In setting forth this opinion in the Jurisdictional Statement, it is noted that the Appellant failed to include the syllabi as reported.

THE EVIDENCE.

On May 23rd, 1957, at about 1:30 P. M., Cleveland Police Officers Michael Haney, Carl Delau and Thomas Dever went to the home of the Appellant, located at 14705 Milverton Road, Cleveland, Ohio. It is a two-family brick dwelling and the Appellant lived on the second floor. The police had received information that there was a person hiding out in this home who was wanted for questioning in

connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home (R. 10).

Three police officers from the Fourth District, the district in which the Appellant's home was located, also arrived on the scene. However, these officers did not participate in the search of the Appellant's upstairs' rooms (R. 20, 28, 29, 44, 47, 48).

Officers Haney and Delau testified that the Appellant refused to admit them to her home on the advice of her attorney, Walter Greene (R. 11). Thereafter, Lieutenant White arrived on the scene with a search warrant (R. 31, 34, 44). The Appellant then admitted the police, tore the search warrant out of the officer's hands and placed it down her bosom (R. 30, 34). She got into a tussle with the police officer who was trying to retrieve the search warrant, as a result of which she was handcuffed to one of the officers and taken upstairs. (R. 30, 34, 80). A search of her bedroom was made, in her presence and while she was seated on the bed (R. 35).

In the Appellant's bedroom in a dresser located beside the bed, Officer Haney came upon four obscene books (State's Exhibits 1, 2, 3, 4) carrying the following titles:

The Affairs of the Troubadour
Little Darlings
London Stage Affairs
Memories of a Hotel Man.

While the police officer was removing these books from the dresser in the presence of the Appellant, she said to the officer, "Better not look at those; they might excite you" (R. 11). This officer then searched the Appellant's suitcase located beside the bed in the Appellant's bedroom and found among her personal papers (State's Exhibits 6, 7,

8, 9) a hand-drawn penciled picture (State's Exhibit 5) of a very obscene nature (R. 12).

Sergeant Delau participated in the search of the Appellant's bedroom along with Patrolman Haney. He found four separate groups of obscene photographs (State's Exhibits 10, 11, 12, 13) and tape recorders in a chest of drawers in the same bedroom, as well as a 25 Caliber Colt automatic gun (R. 35).

Sergeant Delau testified that the bedroom where he found the obscene pictures contained nothing but feminine wearing apparel and that there were no men's clothing in that bedroom. The second bedroom contained only children's clothing (R. 38-39).

A trunk of policy paraphernalia was found in the basement by Patrolman Dever (R. 25-29).

The Appellant testified at the trial and claimed that the books and pictures had been packed and put in her basement, and that they belonged to one Morris Jones. She also testified that Officers Haney and Delau did not find these books and pictures in her bedroom, but that Officer Haney walked into the bedroom with a brown bag containing the books and pictures (R. 41, 43). The jury evidently believed otherwise. She admitted that the hand-drawn penciled drawing (State's Exhibit 5) was in her suitcase, but claimed that she had also packed some of Morris Jones' belongings in her suitcase. She said that Morris Jones had been a roomer in her home. There was no evidence produced at the trial by the defense that any belongings of one Morris Jones were in the home at the time, other than a cosmetology book purportedly belonging to Jones and claimed to have been in the suitcase.

ARGUMENT.

Introductory Statement.

Several statements are made in the Jurisdictional Statement of the Appellant that are not supported by the record. There was no evidence that twelve police officers surrounded and forced their way into the residence of the Appellant. The testimony established that seven police officers arrived on the scene, but other than the Sergeant who testified at the trial, and his two men, the other officers did not play any part in the search of the Appellant's premises (R. 20, 40, 44, 47).

Nor was there any evidence that the Appellant was handcuffed to the banister of the stairway while a search of her private residence was made. Further, there was no evidence that any of the incriminating evidence in the instant case was taken from the home of the Appellant by the use of any brutal or offensive physical force against the Appellant.

I. The Provision in The Ohio "Obscenity" Statute, Revised Code Section 2905.34, That "No Person Shall Knowingly Have in His Possession or Under His Control" Any Obscene Books or Pictures, is not Unconstitutional.

It is established beyond doubt that no constitutional defect is inherent in federal or state regulations of obscene literature—that is, that such regulations are not ipso facto unconstitutional; 1 L. Ed. (2d) 2211; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 1 L. Ed. (2d) 1469, 77 S. Ct. 1325 (involving state regulations); *Roth v. U. S.*, 354 U. S. 476, 1 L. Ed. (2d) 1498, 77 S. Ct. 1304 (involving both state and federal regulations).

In the *Roth* case, this Court held:

> "4. Obscenity is not within the area of constitutionally protected speech or press."

And the test to be applied in judging obscenity was laid down in the *Roth* case, in the following language:

> "12. * * * the proper test is whether, to the average person, applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

The trial court in the instant case instructed the jury in accordance with the foregoing definition.

The appeal this Court refers to in the *Roth* case necessarily is to the prurient interest of an individual who may come into possession of the obscene material as a user. The obvious intent and specific purpose of legislation prohibiting distribution, advertising or sale of obscene material is to safeguard and conserve public morality by preventing the use of obscene matter. Of what value is such legislation if, once such material gets past the book-seller or distributor into the hands of an individual to whose prurient interest it may appeal, the police powers of a state constitutionally cease to operate?

To effectively eradicate obscenity, the police powers of a state should be broad enough to ban every step in the progress of "obscenity," not only prohibiting the manufacture, advertising, sale and distribution but the ultimate scienter retained possession by an individual. Why prohibit distribution and sale of obscene books and pictures if the end result, namely, possession by an individual for private consumption and further circulation is constitutionally protected? Further, how can it be consistently argued that an individual acquires a property right under the constitution, in obscene material? That would seem to

be the reasoning of Judge Herbert of the Supreme Court of Ohio in his dissenting opinion, wherein he says (p. 437):

> "The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual."

The argument against the constitutionality of the legislation under which this appellant was convicted, which appears in the majority opinion of the Supreme Court of Ohio, is based upon the false premise that such legislation is analogous in its effect to that in the *Smith* case (p. 433). The two cases are dissimilar in every respect. There is no tendency in the Ohio legislation under which this appellant was charged to restrict the dissemination of books which are not obscene or to impose a restriction upon the distribution of constitutionally protected as well as obscene literature. Nor is there any tendency in the Ohio legislation to require self-censorship on the part of a book seller or dealer i literature and make a book seller criminally liable without knowledge of the contents of the books and periodicals he has for sale. Further, there is no question in the instant case, as in the *Smith* case, of the effect upon freedom of speech and press.

In the *Smith* case, 361 U. S. 147, 4 L. Ed. (2d) 205, 80 S. Ct. 215, this Court had under consideration a California ordinance making it unlawful, without regard to scienter, for a book-seller to have obscene books in his possession. Five members of the Court held that the ordinance, though aimed at obscene matter, had, *because not requiring scienter on the part of the book seller*, such a tendency to inhibit constitutionally protected expression that it could not stand under the Federal constitution.

The Ohio legislation makes "scienter" an element of the crime to be proven before a defendant can be convicted for possession. The evidence on the trial clearly established that the appellant had possession and control of the obscene books and pictures with knowledge of their obscenity. Judge Taft in the majority opinion of the Supreme Court of Ohio, said:

> "The books and pictures in evidence in the instant case clearly represent, and the undisputed evidence in the record indicates, that defendant knew at the time she is charged with having possessed them that they represented lewd and lascivious books and pictures."

Such legislation as provided for in Ohio properly takes into account that in order to effectively prevent circulation of obscene material, not only a book seller, or distributor of obscenity must be held liable, but the individual who acquires scienter possession and control and to whose prurient interest the material may appeal for further use by way of exhibition or circulation. It cannot be denied that efforts to eradicate the circulation of obscenity in a community would be greatly hampered if possession with scienter by an individual, as distinguished from possession by a book seller or distributor, would be constitutionally protected.

In *State v. Michael Kowan*, 7 O. O. (2d) 81, 156 N. E. (2d) 170, a trial court in Cuyahoga County, in upholding the constitutionality of that portion of Revised Code Section 2905.34 involved in the instant case, said:

> "The danger to the community as a whole is just as great whether the possessor holds the obscene literature solely for his own purposes, as it is when he exhibits or sells it to others."

Further, it was not incumbent upon the State to prove any specific intent upon the part of the appellant with re-

gard to the obscene matter which she had in her possession and under her control. Intent is not an essential element of the offense of obscenity. In 33 *Am. Jur.*, Sec. 5, p. 18, it is stated:

> "The general rule that a guilty intent is not an essential element of a crime that is positively prohibited by statute applies to the offense of obscenity. To constitute the crime of obscenity, there is no necessity for the existence of any specific intent or motive; in fact, although the motive and intent are of the best, this is no defense. * * *"

Whether the intent of a person who retains obscene matter in his possession and under his control is solely because it appeals to his prurient interest or for the purpose of exhibiting or circulating it is immaterial, for the legislation is aimed at the existence of the material itself and the potential possibilities by reason thereof. Legislation regulating obscenity can be likened to legislation prohibiting the possession of narcotics. It is the use to which either may be put that endangers the morals and the health of the people.

It is mentioned in the instant case in the majority opinion, that four members of the Supreme Court of Ohio were of the opinion that this portion of the Ohio obscenity statute is unconstitutional. The same provisions of the statute were considered in *State v. Gevaras*, 170 O. S. 404 (February, 1960) and the Supreme Court held in that case that there was no debatable constitutional question involved.

In the *Gevaras* case, the constitutionality of the obscenity provision under which this appellant has been convicted, was raised. The *Gevaras* case was before the Ohio Supreme Court concurrently with the instant case. The defendant Gevaras was charged in one count with know-

ingly having in her possession and under her control certain lewd and lascivious motion picture films, and in a second count with knowingly exhibiting the films. She was found guilty on both counts as charged.

The decision in the instant case was rendered by the Supreme Court of Ohio on March 23, 1960. The Mapp case (the case at bar) is distinguishable from the *Gevaras* case only, upon the facts, and not upon the law. The point is, Gevaras was charged with two separate offenses under separate counts, namely, one for knowingly possessing and the other for knowingly exhibiting, and she could have been found guilty under either count, without regard to the other. The provision of the statute under which the appellant was charged and convicted is the same provision under which Gevaras was charged. If there was no debatable constitutional question in so far as this legislation was concerned in the *Gevaras* case, how can there be in the instant case? As heretofore pointed out, the two cases are distinguishable upon the facts, but not upon the law.

The Ohio legislation authorizes the confiscation of obscene matter and its destruction (R. C. 2905.35). Accordingly, such property is contraband and there are no property rights involved under the Constitution. Further, in Cuyahoga County, Ohio the right of the police to seize obscene material possessed in one's home has been upheld by our Court of Appeals in *State v. Pomeranz*, 134 O. S. 509.

II. The Rule of Evidence Prevailing in the Courts of the State of Ohio that Confiscated Criminal Evidence, Even Though Obtained Without A Search Warrant Therefor, is Admissible in a Criminal Prosecution, is Not in Conflict With Any Constitutional Provision.

The search warrant about which there is testimony in the record (R. 34) did not cover the incriminating evidence subsequently found in the home of the appellant and upon which she was convicted. However, there is nothing about this case that distinguishes it from any other criminal prosecution in so far as the application of the same rules of evidence is concerned.

The Ohio courts justifiably relied upon the decision in *State v. Lindway*, 131 O. S. 166, 2 N. E. (2d) 490 (appeal dismissed and certiorari denied, 299 U. S. 506, 81 L. Ed. 375, 57 S. Ct. 36) for guidance at the trial and on the appeal, and held that the incriminating evidence found in the home of the appellant was competent and admissible, though obtained without lawful process. And this Court has consistently held, except where the illegal search involves an assault upon the person (*Rochin v. California*, 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A. L. R. (2d) 1396) that in a prosecution in a state court for a state crime, the 14th Amendment does not forbid the admission of evidence obtained by illegal search and seizure. *Irvine v. California*, 347 U. S. 128, 98 L. Ed. 561, 74 S. Ct. 381; *Wolf v. Colorado*, 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359; *Breithaupt v. Abram*, 352 U. S. 432, 1 L. Ed. (2d) 448, 77 S. Ct 408.

There is no sound reason for departing from the *Lindway* decision, or modifying it in its application to this case, as suggested by Judge Herbert in his dissenting opinion. As ground for modifying the Lindway rule, Judge Herbert

points out that the evidence did not disclose a commercial purpose in the possession of these books; that no printing presses were found, nor a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise.'

There is no requirement in that portion of the statute under discussion, that the State establish by the evidence that the appellant was engaged in manufacturing or distributing quantities of obscene books. It is the nature of the material, not the quantity, that the obscenity legislation is aimed at eradicating. The morals of a community can be endangered as well by one book or one picture, as by a volume. And, supposing she had possessed this obscene matter on her person, and scienter was established, it could not be claimed that the State was required to prove, in addition, that she was carrying a printing press around with her, or was manufacturing such obscene matter.

The gist of the offense was possession and control of obscene books and pictures, with knowledge of their obscenity. The police, obviously, did not know that the appellant had this obscene material in her possession until they found it, but having found it without lawful process, did they violate some constitutional right of the appellant in so doing? The constitutional guaranty against unreasonable searches and seizures was never meant to prevent the administration of criminal justice. It speaks of the right of the people to be secure in their persons, houses, papers, and effects. Nothing is said in that provision guaranteeing security and immunity in the commission of crimes.

If we are to interpret the constitutional guaranty against unreasonable searches and seizures as a prohibition of the use of relevant confiscated evidence establishing the commission of a crime, then we have the Constitution

granting immunity from prosecution for a crime, for that would be the end result if criminal evidence such as uncovered in the instant case is not competent and admissible. Without it, the case could not be proven.

We submit that neither the Federal exclusionary rule, nor decisions of the courts of other States have any application in view of the Lindway rule decided by the Ohio courts, which has been properly applied to the facts and circumstances of this case.

III. The Penalty Section of the Ohio "Obscenity" Statute, Is Not Unconstitutional.

In the Jurisdictional Statement, it is claimed in paragraph (b), page 4, that the appellant was given a seven year sentence by the trial court. That is not a fact. In accordance with the laws of Ohio, more particularly Revised Code Section 5143.05, the sentence of the trial court was a general one, and not fixed in duration. The term of such imprisonment is terminated by the Ohio Pardon and Parole Commission and under the penalty section of 2905.34, the Parole Commission could release the appellant on parole at any time after she started serving her sentence, there being no minimum provided for in the statute.

This was not the exercise of any arbitrary power on the part of the trial court and under the circumstances, there was no basis for review by the Court of Appeals of Cuyahoga County of the sentence of the appellant.

IV. Paragraph (e), page 4 of the Jurisdictional Statement is not sufficiently explicit relative to the charge of the trial court, to enable the appellee to answer.

CONCLUSION.

This case was decided on an adequate non-federal basis. The police powers of a State cannot be effectively exercised to eradicate obscenity without legislation such as provided for in the Ohio obscenity statute. The limits of the power of the state to enact laws to promote the health, safety, morals, and general welfare of its people must always be determined with appropriate regard to the particular subject of its exercise; *Near v. Minnesota*, 283 U. S. Supreme Court Reports, p. 707, 75 L. Ed. p. 1363 (1931). Obviously, the opportunity for further dissemination and circulation of obscene matter does not cease when it reaches the possession and comes under the control of a private individual. The opportunity for dissemination and circulation of such material is ever present so long as the material remains in existence, whether it is in the scienter possession of a manufacturer, an advertiser, a book seller or distributor, or, as in the instant case, in the possession and under the control of an individual, who, having acquired knowledge of the contents of the obscene matter, continues to retain possession and control.

We submit that the Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
GERTRUDE BAUER MAHON,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

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Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLANT ON THE MERITS.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,

Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLANT ON THE MERITS.

REPORTS OF OPINIONS.

Opinion of the Ohio Supreme Court.

The Supreme Court of Ohio, on March 23rd, 1960, rendered an Opinion which is reported in Vol. 170 Ohio State Reports at page 427, wherein four (4) of the seven (7) judges of the Supreme Court of Ohio held that the judgment of the Court of Appeals should be reversed, because the statute under which the Defendant-Appellant was convicted was unconstitutional. However Sec. 2 of Article I of the Constitution of Ohio reads in part as follows:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of the Supreme Court of Ohio were of the opinion that no portion of the

Statute upon which defendant's conviction was based was unconstitutional and void, the judgment of the Court of Appeals affirming the judgment of the Common Pleas Court had to be affirmed. This Opinion can be found in the Record at pages 89 and 96.

Order of the Ohio Supreme Court.

The Order of the Ohio Supreme Court, which is dated March 23rd, 1960, is fully set forth in the Record at page 85.

Journal Entry of the Court of Appeals.

The Journal Entry of the Court of Appeals of Cuyahoga County, Ohio, dated March 31st, 1959, is fully set forth in the Record at page 81.

JURISDICTIONAL GROUNDS.

The Appellant was convicted of the crime that she "unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof" (Record "B.") in violation of Sec. 2905.34, Ohio Revised Code (App. "A") and was sentenced from one (1) to seven (7) years confinement in the Ohio State Women's Reformatory and is presently at large on bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00). The judgment and sentence was appealed to the Court of Appeals, which on the 31st day of March, 1959, affirmed the judgment and sentence of the Common Pleas Court. This ruling was appealed to the Supreme Court of Ohio, which Supreme Court affirmed the decision of the Court of Appeals on

March 23rd, 1960, the Opinion being found in the Record at pages 89 and 96.

In the Ohio Supreme Court, on March 29th, 1960, pursuant to the rules of Court, the Court was notified that an Application for re-hearing was to be filed. On April 4th, 1960, the Application for re-hearing was filed. On April 13th, 1960, the rehearing was denied, and on June 15th, 1960, the Notice of Appeal to the United States Supreme Court was filed.

On October 24th, 1960, this Honorable Court made its order noting probable jurisdiction.

Jurisdiction in matters of this kind is conferred upon the Court by, and appeal is taken pursuant to 28 U. S. C. Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES.

The pertinent portions of the United States Constitution involved in this Appeal are:

Amendment IV; Amendment V; Amendment VI; Amendment XIV Section 1, all of which are set forth verbatim in Appendix "A" attached hereto and made a part hereof, and which can be found in the Appendix to Page's Ohio Revised Code Annotated, page 297, *et seq.*

The pertinent portions of the Ohio Constitution involved in this Appeal are as follows:

Article I Section 1; Article I Section 2; Article I Section 5; Article I Section 9; Article I Section 10; Article I Section 14; Article I Section 19; Article II Section 1; Article II Section 26; Article IV Section 2; Article IV Section 6 all of which are set forth verbatim in Appendix "A" attached hereto and made a part hereof, and which are set forth in the Appendix to Page's Ohio Revised Code Annotated.

The pertinent Statutes of the State of Ohio which are involved in this Appeal are as follows:

Sec. 2905.34; Sec. 2905.36; Sec. 2905.37; Sec. 2905.38; Sec. 2905.39; Sec. 2909.01; which Sections are set forth, verbatim, in Appendix "A" attached hereto and made a part hereof, and which can be found in Title 29 at Page's Ohio Revised Code Annotated at page 62, *et seq.*, and Sec. 3767.01 (C) which is set forth, verbatim in Appendix "A" attached hereto and made a part hereof, and which can be found in Title 37 of Page's Ohio Revised Code Annotated, at page 201.

QUESTIONS PRESENTED BY THIS APPEAL.

The questions presented by this Appeal are as follows:

(a) Is Sec. 2905.34 O. R. C. unconstitutional, and particularly is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26, of the Ohio Constitution?

(b) Does a sentence of seven (7) years for violation of Sec. 2905.34 O. R. C. violate Amendment VIII of the United States Constitution and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

(c) Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, and Article I Section 14, of the Ohio Constitution?

(d) Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution in holding that it could not review the sentence of the trial Court?

(e) Did the charge by the Court to the jury, on presumption, thereby effectively depriving the defendant of a trial by a jury, and did other charges by the Court to the jury, violate Amendment V, Amendment VI and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5, Article I Section 10, of the Ohio Constitution?

STATEMENT OF THE CASE.

On the 23rd day of May, 1957, police officers, without the benefit of a search warrant, ostensibly looking for an individual who was wanted in connection with an extortion bombing (Record page 4), forced their way into defendant's private residence, which was the upper portion of a two (2) family house. (R. 3 and 4.) Twelve (12) police officers had surrounded the private residence of the defendant (R. 30) where she lived with her 13 year old daughter (R. 6 and 43), and forced their way into it (R. 30). Upon demand of a search warrant, a piece of paper was held before the defendant without giving her an opportunity to view or read same (R. 45). Her counsel, who had arrived at the scene by this time, was denied entrance to her residence during the unlawful search (R. 31). This alleged search warrant was never proved or even tendered in the trial court upon request of the defendant. Nor was there any evidence introduced that any search warrant was ever issued. (Opinion of Ohio Supreme Court, R. 92).

Thereafter, the police officers, frustrated in their attempt to find any individual involved in an extortion bombing, illegally and in violation of defendant's Constitu-

tional rights, searched her private dwelling, and found lewd and lascivious documents *belonging to a former roomer*. The evidence showed that these documents were found by the defendant while she was cleaning a room which had been vacated by the former roomer (R. 39 and 47). She stored these documents until such a time as the roomer would have returned to claim his property (R. 48). It was for possession of the *roomer's* documents that the defendant was convicted of violation of Sec. 2905.34 O. R. C., and sentenced to from one (1) to seven (7) years in the Ohio State Women's Reformatory. Perversely, under Sec. 2909.01 O. R. C. (Appendix "A") had the defendant destroyed the documents instead of storing them, she would have been liable to a sentence of from one (1) to seven (7) years imprisonment. That Section reads in part as follows:

> "No person shall maliciously destroy or injure property not his own.
>
> Whoever violates this section shall be imprisoned not less than one (1) or more than seven (7) years if the value of the property destroyed, or the injury done, is One Hundred Dollars or more * * *."

ARGUMENT.

I. Is Section 2905.34 O. R. C. unconstitutional, and particularly is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V; Amendment XIV Section 1 of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, and Article II Section 26, of the Ohio Constitution?

Until 1955-56, there was declared by the law a requirement under which no one could possibly be accused under circumstances such as those in the case at bar. The following are some portions from the old law:

> "Sec. 13035. Disposing of, exhibiting, advertising, etc., obscene literature or drugs for *criminal purposes*. Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away, or exhibit, or publishes or offers to publish or *has in his possession for such purpose* an obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing * * *." (Italics ours.)

Now in Sec. 2905.34 O. R. C. we have such indefinite terms, with the cruelest and most unusual of punishments, under which anyone can be convicted, no matter how innocent of purpose. Is this statute constitutional? A strict construction of said statute which was done in the case at bar would subject the police officers making the arrest and taking said evidence into their possession, the Court attaches having said evidence in their possession and even the judges having said evidence in their possession guilty under the strict construction of this statute.

Sec. 2905.34 O. R. C. must be construed along with Sec. 3767.01 O. R. C. and in doing so, one will find that the same piece of literature and the same item of photography

can be subjected to two interpretations, causing a class exemption to be brought into being. This is set forth in *Nanny vs. Oregon Liquor Control Commission*, 171 Pac. (2d) 360:

> "Syl. 3: The policy of the law is not to punish the innocent, and Courts must look beyond the strict or literal sense of words in a statute to avoid an absurd or unjust result, and all laws shall receive a sensible construction.
>
> Syl. 4: The rule of construction according to the spirit of the law is applicable where adherences to the letter will result in absurdity or injustice."

There are distinct conflicts between the law under which the defendant was convicted and other existing statutes in the State of Ohio. We can not believe that one must deal with the property of another under circumstances like those at bar by destruction, when destruction of any contraband, is still a crime. We could find no decisions defining "possession of lewd literature." What was the defendant to do upon finding the documents owned by her former roomer, Jones? While defendant was convicted and sentenced to imprisonment for "possession of lewd literature" for a period of from one (1) to seven (7) years, had she destroyed this property, under Sec. 2909.01 O. R. C. (Appendix "A") she also would have been liable to a sentence of from one (1) to seven (7) years in prison for such destruction.

A most impelling argument can be found in the majority opinion of the Ohio State Supreme Court (R. 93), a portion of which, because of its force and pertinence is repeated herein.

> "The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. Ed. (2d) 2211. That annotation does not indicate

that there is any case decided by a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited as it was under Sec. 2905.34 Revised Code (former Sec. 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even where the possessor does not have a purpose of again looking at the books or pictures; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her evidence that she had innocently acquired possession of the articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner. Cf. Lambert vs. Calif., 355 U. S., 25, 2 L. Ed (2d) 228, 78 S. Ct., 240, Weems v. U. S., 217 U. S., 349, 54 L. Ed. 793, 30 S. Ct. 544.

If, as defendant's evidence discloses defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him, and while doing that, necessarily learned of their lewd and lascivious character, then at that instant, she had 'in' her 'possession' and 'under' her 'control' a 'lewd or lascivious book * * *, print (or) picture', as exhibited by this statute.

If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.

Smith v. California (1959), _____ U. S. _____ 4 L. Ed. (2d) 205, 80 S. Ct., 215, held invalid a

legislative provision that made it 'unlawful for any person to have in his possession any obscene or indecent writing, (or) book * * * in any place of business where * * * books * * * are sold or kept for sale.'

In the Court's Opinion by Mr. Justice Brennan, it is said:

'We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and press. Roth vs. U. S., 354 U. S. 476, 1 L. Ed. (2d) 1498, 77 S. Ct. 1304. * * * Our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect by penalizing book sellers, even though they have not the slightest notice of the character of the books they sold. * * * If the book seller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * The book sellers' burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of book shops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The book seller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The book seller's self-censorship, compelled by the State would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through

it, the distribution of all books, both obscene and not obscene, would be impeded.'

It may be argued that the legislation involved in the instant case, unlike that involved in the Smith case, requires scienter because it only makes it unlawful to 'knowingly * * * have * * * possession.' However, this legislation is analogous in its effect to that in the Smith case. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. Benjamin vs. City of Columbus, 167 O. S. 103, 146 N. E. (2d) 854, where no question of freedom of press involved.

In the opinion of the Judges Taft, Bell, Herbert and Peck, the portion of Sec. 2905.34 Revised Code upon which defendant's conviction was based is constitutionally invalid, and, for that reason the judgment of the Court of Appeals should be reversed * * *."

Justice Herbert of the Ohio State Supreme Court in his dissenting opinion (R. 98) goes even further in indicating other reasons why Sec. 2905.34 O. R. C. should be held unconstitutional. Justice Herbert says:

"It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in the evidence in the present case is and should be against public morals and policy if for no other reason than that the immature mind which might be exposed to it could be greatly harmed, I can not agree that mere private possession of such

literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual. Does the State have the power to prohibit the possession of chemistry books because from such books one might learn how to make a bomb or poisonous gas? Is the possession of medical books by a layman to be banned because of the possibility that he might learn about abortion and perhaps put such knowledge to use?"

The type of statute under consideration herein, making mere possession a felony, is rare in the United States, the penalty is usually a fine only, even where the defendant is a seller, publisher and an exhibitor for sale. Thus in a most recent ordinance case, reviewed in 6 O. O. (2d) 313, *City of Cincinnati vs. King*, the defendant possessing such literature for sale was tried under an ordinance with a maximum fine of One Hundred Dollars ($100.00) or sixty (60) days.

Until 2905.34 O. R. C. was enacted, possession itself was not enough, but it had to be "for the purpose of publishing or offering to publish" (O. G. C. 13035). Cognate statutes covering separately the acts embraced in detail in O. R. C. 2905.34 continued to exist in Ohio, under which the prosecution or grand jury may proceed to charge only a misdemeanor with fines and jail, a sentence of days or months, at their option.

In *Goldstein vs. Com.*, 104 S. E. (2d) 66, a statute containing similar language to that in 2905.34 O. R. C. was held invalid, though a misdemeanor, it had among other words, these (descriptive of the obscene materials):

"tending to corrupt the morals of youth, or introduce in any family, etc.", and the Court said:

> "Syl. 2. The crime of obscenity must be defined with appropriate definiteness and with clear and unequivocal tests to ascertain guilt.
>
> Syl. 4: * * * Statute prohibiting * * * was unconstitutional insofar as it undertook to provide a standard of judging obscenity depending upon the undesirable effect the offensive material may have upon youth."

We can not distinguish the case at bar (except that mere possession is not a crime) from that discussed and held invalid by the Supreme Court of the United States in *Winters vs. N. Y.*, 333 U. S. 507, 1948, which was based upon a misdemeanor, and in Ohio, a felony.

We quote the syllabus and the statute of New York and the Court's reason for holding the statute unconstitutional:

> "Subsection 2 of Sec. 1141 of the New York Penal law, as construed by the State Court of Appeals, to prohibit distribution of a magazine principally made of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against a person, held so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guarantee of free speech and press."
>
> Opinion Page 508,
>
> "Sec. 1141. Obscene prints and Articles.
>
> 1. A person * * * who
>
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his *possession with intent to sell*, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution,

any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or acts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime; * * *"

Page 519:

"* * * too uncertain and indefinite to justify the conviction of the prisoner * * *." (Italics ours.)

Until 1955, no one could possibly be accused under circumstances claimed by the State in the case at bar, because "possession had to be for the purpose of publishing or offering to publish" (See O. G. C. 13035) and the punishment was a fine or jail sentence, for it was a misdemeanor only. The Legislature under the new enactments gave a power of discrimination between persons for the same act, so a prosecutor or grand jury could make the act a felony with a penalty of seven (7) years, or a misdemeanor with a fine, etc. only. Such a power makes the statute unconstitutional, in view of O. R. C. 2905.38, O. R. C. 2905.39, O. R. C. 2905.36, under which the same acts covered in 2905.34 O. R. C. can be severally charged and punished as misdemeanors with fines and days, as in the statutes detailed.

Thus under O. R. C. 2905.36, sending obscene literature by mail or giving oral information where, how * * * lascivious articles or things can be purchased or obtained, may result only in a Fifty Dollar ($50.00) to One Hundred Dollar ($100.00) fine or not more than a year * * *.

Under O. R. C. 2905.38, delivering or depositing immoral literature * * * or mail to a child under sixteen (16) years of age * * * advertising drug or method of treatment * * * disease * * * Twenty-Five Dollars ($25.00) to One Hundred Dollars ($100.00) or thirty (30) to one hundred (100) days.

Under O. R. C. 2905.39, "a person who posts * * * publishes * * * exhibits on walls, etc. where it can be publicly seen, a picture or figure that is lascivious, indecent, immoral, or impure, or which represents crime or lust * * * can be fined for such first offense, Fifty Dollars ($50.00) to Five Hundred Dollars ($500.00)" and subsequent offenses thirty (30) days to six (6) months or both.

This type of prosecution is contained in reported State cases and we quote from one of them, *State vs. Pirkey*, 281 Pac. (2d) 698, page 702:

> "The Fourteenth Amendment operates to forbid discrimination by States against persons or classes in criminal cases.
>
> And it has been held that where a statute which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situations, is violative of the equal protection clause (citing cases).
>
> * * * There is no semblance of a classification which would enable one to ascertain under what circumstances he may be guilty of a felonious crime, or under what circumstances he may be guilty only of a misdemeanor.
>
> * * * It might be said that the statute classifies punishments, but does not classify the circumstances to which the diverse punishments are to be applied. This is not legal classification. It is legal chaos * * * the statute must be void."

The very nature of the situation in the case at bar shows none of the indicia of a vicious act, such as that of a seller or distributor who caters to depraved minds. The articles were not her property, but that of a roomer—they were packed away to await his disposition. In intoxicating liquor cases (other kinds not found) the Courts have held there is no possession and control in circumstances like that at bar (See: *People v. Archer*, 190 N. W. 622, Syl. 2;

Presont vs. U. S., 281 Fed. 131 (6th Circuit); *State v. Flint*, 269 Pac. 476; *Tearney v. State*, 185 Pac. 1104).

Mrs. Mapp was not chargeable because Jones did not remove his property. (See: *State v. Waxman*, 93 N. J. Law 27; *Com. vs. Guild*, 170 Atl., 699, Syls. 1 and 5.)

As we have indicated above, and as the Record divulges, Dollree Mapp committed no crime. She was not in possession and control of the articles belonging to the roomer, Jones. No person who happens to have possession, merely, could have been intended by the Legislature to have imposed upon them a seven (7) year sentence; especially is this to be observed from O. R. C. 2905.36, 2905.38, 2905.39, and 2905.41. Such a sentence provided by a statute makes not only the statute unconstitutional, but the punishment excessive.

II. Does a sentence of seven (7) years for a violation of Sec. 2905.34 O. R. C. violate Amendment VIII of the United States Constitution, and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

Considering all of the facts and circumstances attendant to the case at bar, and respectfully calling the Court's attention to the fact that the property, the possession of which, resulted in the conviction of the defendant, was not her property; that had she destroyed said property instead of storing it she would have been liable to a sentence of from one (1) to seven (7) years under Sec. 2909.01 O. R. C.; that the defendant's record had previously been unblemished; that she was living peacefully and quietly in the premises which were violated, with her 13 year old daughter, the sentence in the case at bar was excessive, cruel and unusual.

In Article I Section 9 of the Constitution of the State of Ohio, it is provided:

> "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Amendment VIII of the United States Constitution reads as follows:

> "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishment inflicted."

In *Cincinnati vs. King*, 6 O. O. (2d) 313, is reflected the current ordinances which impose merely a fine of One Hundred Dollars ($100.00) or sixty (60) days, even for possession of obscene literature for sale. The Ohio statute is rare and unusual.

In *Weems vs. U. S.*, 217 U. S. 349, is laid down the test; we quote:

> "In determining whether a punishment is cruel and unusual as fixed by the Phillipine Commission, the Court will consider the punishment of the same or similar crimes in other parts of the United States as exhibiting the difference between the power unrestrained and that exercised under the spirit of constitutional limitation formed to establish justice." (See: 46 S. E. (2d) 273, State vs. Kimbrough, Syl. 2; 55 Atl. (2nd) 883, N. J. Mayor, etc. vs. Bauer, Syl. 4; 19 So. 457, State Ex. Rel. Garvey vs. Whittaker, Recorder; 104 Pac. 596, State vs. Roth; 254 N. Y. S. 786, People vs. Betts), where the Court said:
>
> "A free man shall not be amerced for a small offense, but only according to the degree of the offense * * *."

III. Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1 and Article I Section 14 of the Ohio Constitution?

Though Ohio has permitted evidence under circumstances of seizure, this does not, the Supreme Court of the United States has said, permit a conviction under circumstances of oppression—the Bill of Rights can not be intended to permit what "due process" forbids.

We need not review the Record—the conduct shown therein and mentioned above portrays a shocking disregard of human rights. In a case similar in principle, a conviction under a State law forbidding possession of morphine was reversed in spite of the claim by the State that evidence procured by illegal seizure could be used in "State Court," because obtained by methods violative of the due process, as the Fourteenth Amendment guarantees. See *Rochin vs. California*, 342 U. S. 165.

In that case, on information defendant was selling narcotics, State officers entered his home and forced their way into the bedroom occupied by him. He swallowed two (2) capsules. He was taken to the hospital, where an emetic was forced into his stomach. He vomited two (2) capsules which were found to contain morphine.

We quote from the Opinion in the *Rochin* case:

Page 172:

"This is conduct that shocks the conscience. Illegally break[s] into the privacy of the petitioner * * * offends [the] hardened sensibilities."

Page 179:

"It is a requirement of due process for a trial in the Federal Court House, it is impossible for me to say it

is not a requirement of due process for a trial in the State Court House * * *. We can not in fairness free the State Courts from that command."

We respectfully call to the Court's attention the similarity in wording between Amendment IV of the United States Constitution and Article I Section 14 of the Ohio Constitution.

The case which distinguished the Federal rule from the State rule in Ohio is known as *State vs. Lindway*, 131 O. S. 166, 2 N. E. (2d) 490. Mr. Justice Herbert of the Ohio Supreme Court, not only joining in the majority opinion that the Statute is unconstitutional, but going one step further indicates why, in his opinion (R. 96) the case at bar should be distinguished from the *Lindway* case. Pertinent portions of Justice Herbert's dissenting opinion will be reproduced below:

"The judgment in the Lindway case is not in conflict with this constitutional provision. Had I been a member of the Court at that time I would have joined in the judgment as all of the members of the Court then did because the evidence there clearly established that the defendant was operating a bomb manufacturing shop in the basement of their house. As stated by Jones, J., in the concurring opinion in that case: 'this defendant was suspected of manufacturing bombs and of being engaged in the night-time bombing of the homes of employees of a manufacturing company. If the search produced evidence of his projective crime, the evidence should have been admitted; for neither Constitution nor State law was intended to provide security for such dangerous enemies at our public peace.' The foregoing sentence contains ample legal foundation and justification for the judgment affirming the conviction there as to that portion of the Syllabus, however, relating to evidence obtained by an unlawful search,—in which only a bare majority concurred—it seems to me to be far

too comprehensive and susceptible to abuse by police and prosecution authorities. As a rule, abuse by such officials rarely occur; but when they do the constitutional rights of the private citizen should be fully protected. The broad scope of the rule relating to evidence obtained by an unlawful search, as stated in the Lindway syllabus, leads me to the inescapable conclusion that in too many instances it virtually sterilizes the constitutional guarantees provided by Section 14, Article I.

On the basis of the constitutionality of Sec. 2905.34, O. R. C., which is fully discussed and disposed of in the majority opinion, this case seems to me to afford a perfect opportunity for the Court to modify and limit the Lindway rule in the direction indicated by Jones, J., so as to bring it into accord with a more reasonable interpretation of the above quoted provisions of the Constitution and the requirements of the statutes enacted to implement it.

* * * * *

Ironically enough, there being no evidence of the issuance of a search warrant for obscene books, the provisions of this last sentence are not applicable to the disposition of evidence in the instant case.

* * * * *

Under the principles stated by Jones, J., in his concurring opinion in Lindway, a conviction could well be sustained in this case if books had been discovered in the home of defendant in quantities indicating a purpose to sell, lend, give away, exhibit or offer to do so (See 'for such purpose' supra) but on the facts here, it seems to the writer that the constitutional right of the defendant 'to be secured * * * against unreasonable searches and seizures' was violated.

It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which

overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in evidence in the present case is and should be against public morals and policy, if for no other reason than that the immature mind which might be exposed to it, could be greatly harmed, I can not agree that mere private possession of such literature by an adult should constitute a crime * * *.

The foregoing paragraph is perhaps more applicable to discussion of the constitutionality of Sec. 2509.34 O. R. C. than to the issue on which I dissent, but since under another provision of the Constitution a bare majority of this Court is powerless to invalidate the portion of that section under which the defendant was convicted, we certainly should scan carefully the method by which the evidence was acquired for such conviction. I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home from unlawful search and seizure had been lost by her own conduct (as in the Lindway case where a bomb factory was discovered), but on the undisputed facts, as disclosed in this Record, I can not so conclude. See, also, Paragraph 2 of the Syllabus in Fiano vs. State, 15 O. S. 229, 137 N. E. 11.

* * * * *

As Jones, J., stated in his concurrence in the Lindway case: 'It is not for the class of criminal element alluded to, but for the class embodying millions of citizens who are innocent of any offense or whose offenses are minor, that I urge protection under the Search and Seizure Clause of the State Constitution. The decision of this Court in the instant case is too broad, since it is made to apply to everyone suspected of committing any offense whatever. There is one

advantage the occupant of a bona fide dwelling now has and always has had—he could discover whether a search warrant had in fact been issued and for, his own protection, could demand its production.

Here, the defendant did just that and the evidence is uncontradicted that she was not given an opportunity to read it, if any was issued. In fact, it was not even contended by the prosecution that a warrant was ever issued authorizing a search of her home for obscene literature. In my view, the Lindway rule which is being followed in this case should be modified and clarified so that there will no longer be a judicial stamp of approval on the use of unlawful means to justify an end result. Here an admittedly private home was unlawfully searched, and again concur in a judgment upholding conviction based solely on evidence so obtained.

Bell, J., concurs in the foregoing dissenting Opinion."

IV. Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution holding that it could not review the sentence of the trial Court?

Article IV Section 6 creates the Court of Appeals and gives jurisdiction of said court "to review, affirm, modify, set aside or reverse judgments or final orders of * * * Courts of record inferior to Courts of Appeals * * *." There is no exception of the kind claimed, anywhere, and the Court can not refuse to exercise its jurisdiction.

See *State vs. Kimbro,* 46 S. E. (2d) 273, Syl. 3:

"The power of an appellate court to review a sentence for the purpose of determining whether it finds the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from."

Page 275:

"The constitutional restrictions should be regarded as an admonition to both the legislature and the judiciary."

The Court of Appeals in the instant case said "* * * The question of punishment is within the exclusive jurisdiction of the trial Court. The judgment of the Court of Common Pleas is therefore affirmed * * *." (R. 81.)

Clearly, the judgment of the Court of Appeals is contrary to the Section of the Ohio Constitution set forth above.

V. Did the charge of the Court to the jury, on presumption, thereby effectively depriving the defendant of a trial by jury, and did other charges by the Court to the jury, violate Amendment V, Amendment VI, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5 and Article I Section 10, of the Ohio Constitution?

The Record at page 65 discloses that the Court charged the jury:

"The law presumes that a sane person intends the ordinary consequences of his own voluntary acts."

Overlooking the omission of the requisite words "natural and probable consequences" the Court further omitted the qualifications required by law—in a case where presumption may be charged. The case at bar was not a case admitting of any charge as to presumption, for both sides had given evidence, and the facts were to be judged by the jury without any charge as to presumption. The Ohio State Supreme Court stated as follows:

"Syl. 3. Where a litigant introduces evidence tending to prove a fact, either directly or by inference * * *

the presumption never arises and the case must be submitted to a jury without any reference to a presumption in either a special instruction or a general charge." (*Ayers vs. Woodard*, 166 O. S. 138.)

Also, in *State vs. Cook*, 282 S. W. (2d) 533, at page 535 (Criminal case), the Court said:

"We hold that in the presence of the actual facts, as testified to here by eye-witnesses, it was improper to instruct the jury concerning a presumption of intent and malice."

In *State vs. Martin*, 260 S. W. (2d) 536, at Syllabus 9, the Court said as follows:

"Presumption as to defendants' mental intent does not exist in the presence of facts disclosed to the jury, and in such instances, instruction on presumption should not be given."

See also, *Searles vs. State*, 3 O. C. D. 478, Syl. 15; and *Crobaugh vs. State*, 45 O. A. 410, Syl. 3.

Such a charge is a violation of due process, and has deprived the defendant of a right to a trial by a jury.

In *Marisette vs. U. S.*, 342 U. S. 246, the Court said:

"* * * The trial court may not withdraw or pre-judge the issue by insrtucting the jury that the law raises a presumption of intent from a single act * * *."

The Court, at page 275 went on to say:

"A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. * * *"

Thus, defendant was deprived of a trial by jury, one of the rights guaranteed under the Constitution of the United States and the State of Ohio, and the burden was placed upon her, instead of the State.

In addition to those instructions with which we have just taken issue, the one appearing in the Record at page 66, which in effect instructed the jury as to what was possession, should not have been given. This instruction reads as follows:

> "One who deposits articles in a place of concealment may still be deemed to have them in his possesion."

With a term so loose, and needing accuracy of pertinent applications, as "possession and control" the Court should not have given that charge.

The fact was that the defendant, in the usual way when a roomer left his things, put them in a box or bag so she could use his room, as he was no longer to occupy it. The items of personal property were to be called for by the roomer, Jones, as was his right, or to be called for by whomever the roomer, Jones, sent for them. Because of this set of circumstances, the trial judge implied that: "She was nevertheless in possession, they being concealed" even though she was obliged under the law to refrain from destroying them.

Use of words as "detaining" and "holding," at most a mere superficial act,—as "possession" in the sense of a substantial act of a real possessor for a guilty purpose was also misleading. Possession should have been defined as possession for some sinister or illegal purpose, otherwise, as indicated earlier, even the detectives who impounded the evidence would have been guilty under the statute.

The Court should not have given the charge:

> "The test is whether or not the defendant had *some degree* of possession and control over the material alleged in the indictment." (R. 66.)

Thus the jury was left to speculate as to what that "some degree" was which made criminal, "possession and control" as intended by the law. This type of charge is condemned in *State vs. Stewart,* 283 Pac. 630, the Court saying the word "some" specified nothing respecting the nature of the "right," power or control essential to possession."

It is fatal to a conviction from Constitutional standpoint when a Court does not correctly instruct a jury on essential elements of the crime charged. See: *Gerds vs. State,* Syl. 2, 64 So. (2d) 915; *State v. Collins* (Ohio) Syl. 2, 115 N. E. (2d) 844.

CONCLUSION.

Defendant-Appellant respectfully urges:

1. That this Honorable Court find and adjudicate that Section 2905.34 of the Ohio Revised Code be declared to be and is unconstitutional and that final judgment be rendered discharging this Defendant-Appellant.

2. That the evidence introduced in the trial of this cause in the Common Pleas Court was procured contrary to the provisions and in violation of Defendant-Appellant's constitutional rights under Amendment IV, Amendment V and Amendment XIV Section 1 of the United States Constitution and Article I Section 1 and Article I Section 14 of the Ohio Constitution and should not have been received in evidence and that by reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

3. That this Honorable Court adjudicate that the court below erred in overruling the Motion of Defendant-Appellant before trial on September 3, 1958, to suppress the evidence for the reasons above stated, and that by

reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

4. That this Honorable Court find and adjudicate that the errors of the trial court in its charge to the jury effectively deprived the Defendant-Appellant of due process of law and that said errors were prejudicial to this Defendant-Appellant and did deprive her of a fair trial and that by reason thereof, we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

5. That this Honorable Court find and adjudicate that the sentence imposed upon this Defendant-Appellant, to-wit: one (1) to seven (7) years is cruel and unusual punishment, particularly under the facts and circumstances in the case at bar and by reason thereof the constitutional rights of Defendant-Apppellant were violated, and therefore respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

6. That this Honorable Court find and adjudicate that the Court of Appeals violated the provisions of the Constitution of Ohio when it held that it could not review the sentence of the trial court, thereby prejudicing this Defendant-Appellant in her constitutional rights by reason of which we respectfully ask this Honorable Court that final judgment be rendered discharging this Defendant-Appellant.

Respectfully submitted,

A. L. KEARNS & WALTER L. GREENE,

Attorneys for Defendant-Appellant.

APPENDIX "A."

Pertinent Portions of United States Constitution.

AMENDMENT IV.

"SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V.

"RIGHTS OF PERSONS.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI.

"RIGHTS OF ACCUSED.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VIII.

"PUNISHMENT FOR CRIME.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV SECTION 1.

"RIGHTS OF CITIZENS.

Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Portions of Ohio Constitution.

ARTICLE I SECTION 1.

"RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

ARTICLE I SECTION 2.

"RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND SPECIAL PRIVILEGES.

All political power is inherent in the people. Government is instituted for their equal protection and benefit * * *."

ARTICLE I SECTION 5.

"TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM

The right of trial by jury shall be inviolate * * *."

ARTICLE I SECTION 9.

"BAILABLE OFFENSE; OF BAIL, FINE, AND PUNISHMENT.

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; *nor excessive fines imposed; nor cruel and unusual punishments inflicted.*"

ARTICLE I SECTION 10.

"TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS: DEPOSITIONS BY STATE AND COMMENT ON FAILURE OF ACCUSED TO TESTIFY IN CRIMINAL CASES.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indict-

ment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial *by an impartial jury* * * *."

ARTICLE I SECTION 14.

"SEARCH WARRANTS AND GENERAL WARRANTS.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

ARTICLE I SECTION 19.

"INVIOLABILITY OF PRIVATE PROPERTY.

Private property shall ever be held inviolate * * *."

ARTICLE II SECTION 1.

"IN WHOM LEGISLATIVE POWER IS VESTED.

The legislative power of the state shall be vested in a general assembly * * *."

ARTICLE II SECTION 26.

"WHAT LAWS TO HAVE A UNIFORM OPERATION.

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect

upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."

OF ARTICLE IV SECTION 2.

"THE SUPREME COURT.

* * * No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void * * *."

ARTICLE IV SECTION 6.

"COURTS OF APPEALS.

* * * The court of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district * * *."

Pertinent Statutes of the State of Ohio.

Section 2905.34 (13035) Selling, exhibiting and possessing obscene literature or drugs, for criminal purposes.

No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements,

photographs, or drawings, representation, figure, image, cast, instrument, or articles of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

Section 2905.36 (13036) Sending obscene literature by mail.

No person shall deposit in a post office, or place in charge of a person to be carried or conveyed, any of the obscene, lewd, indecent or lascivious articles or things named in Section 2905.34 of the Revised Code, or a circular, handbill, card, advertisement, book, pamphlet, or notice of the kind specified in said section, or give oral information, where, how or of whom such obscene, lewd, indecent, or lascivious articles or things can be purchased or obtained or knowingly receive any of them with intent to carry or convey, or knowingly carry or convey them, except in the United States mail.

Whoever violates this section shall be fined not less than fifty nor more than one thousand dollars or imprisoned not more than one year, or both.

2905.37 (13037) Legitimate Publication Not Obscene.

Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit.

Section 2905.38 (13038) Delivering or depositing immoral literature.

No person shall leave or place or cause to be left or placed upon the doorstep or premises owned or occupied by another, or deliver or mail to a child under sixteen years of age, printed or written matter advertising or mentioning therein a drug, nostrum, receipt, or method of treatment for venereal diseases or referring to a method of treatment purporting to restore procreative organs injured by immoral practices.

Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not less than thirty nor more than one hundred days, or both, for each offense.

Section 2905.39 (13039) Printing or posting immoral pictures.

No person shall make or print in or upon his premises, or post, publish, or exhibit in or upon a building, billboard, bridge, or fence where it can be publicly seen, a picture or figure that is lascivious, indecent, immoral, or impure, or which represents crime or lust, or tends to corrupt morals, or permit such an act to be done by another in or upon his premises, building, billboard, bridge, or fence.

Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars for a first offense; for each subsequent offense, in addition to such fine, such person shall be imprisoned not less than thirty days nor more than six months.

This section does not apply to the printing and publication in book or magazine form of illustrations for scientific purposes.

Section 2909.01.

No person shall maliciously destroy or injure property not his own.

Whoever violates this section shall be imprisoned not less than one or more than seven years if the value of the property destroyed, or the injury done, is one hundred dollars or more * * *.

Section 3767.01 (C), Ohio Revised Code.

This section and Sections 2905.34, * * * 2905.37 * * * of the Revised Code shall not affect * * * any newspaper, magazine, or other publication entered as second class matter by the post-office department.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM THE SUPREME COURT OF OHIO.

[redacted] BRIEF OF APPELLEE ON THE MERITS.

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APPEAL FROM THE SUPREME COURT OF OHIO.

SUPPLEMENTAL BRIEF OF APPELLEE ON THE MERITS.

The appellee has refiled the brief heretofore filed with the Motion to Dismiss or Affirm, for the hearing on the merits.

STATEMENT OF THE CASE.

There are several unsupported and inaccurate statements made in the Statement of the Case (App. Br. pp. 5-6) in the brief of the appellant on the merits.

To say, as they do in their brief on the merits, that "It was for possession of the roomer's documents (???) that the defendant was convicted of violation of Sec. 2905.34 O. R. C." (App. Br. p. 6), is an assumption unsupported by any such finding by the jury. Further, to refer to this obscene matter as "documents" is, to say the least, also inaccurate. There was never any issue raised either on the trial or on review in the State courts as to the "obscenity" of the material offered in evidence.

It should be borne in mind that this case was tried to a jury. It was, therefore, solely within the province of the jury to weigh the evidence and, as triers of the facts, to determine wherein the truth lay. The appellant was charged with unlawfully and knowingly having in her possession and under her control certain obscene books and photographs. This charge required along with proof of scienter, proof of a voluntary personal possession and control by the appellant; "the present right and power to do with it as one will," as stated by the trial court to the jury (R. 66).

The appellant was not charged in the indictment with involuntary possession of this obscene material for some alleged roomer. That was the defense offered in this case on the trial. She claimed she had possession for someone else. Whether or not there was any truth to that defense became a jury question, since the evidence offered by the State was in direct conflict with that offered by the defense as to where the obscene matter was found.

The jury found her guilty "as charged in the indictment" (R. D.). In finding her guilty of the charge contained in the indictment, the jury necessarily had to reject the defense evidence that she had involuntary possession for someone else; that these books and photographs were possessions of an alleged roomer which had been stored by the appellant in the basement.

Not only did the State's evidence contradict her story on the element of "possession" as to the location in which this obscene material was found by the police, but the personal element of scienter was proven beyond a reasonable doubt (R. 5).

Under the circumstances, the assumption by the defense that the appellant was convicted under this statute in question, for obscene material possessed by a roomer,

is not based upon any such finding by the jury. Nor could the jury have made any such finding on the charge contained in the indictment, or the instructions given by the court. Neither the language of the statute, the charge contained in the indictment, nor the instructions of the court contemplates a conviction by the establishment of proof by the evidence of an involuntary, constructive possession and control of obscene matter by a defendant for a third person. And, for the latter reason, Syllabus 1 of the decision of the Supreme Court of Ohio in this case, based as it is upon the defense evidence only, is subject to criticism. Further, there was no evidence produced by the defense to show that there were any roomer's possessions in that basement.

There was no request by the defense during the trial for the production of the search warrant or that it be tendered, and their statement to that effect at page 5 of their brief on the merits is unsupported by the record.

The police officers who made the search and who were the witnesses in this case, testified that they did not obtain the search warrant. Their testimony shows that they awaited the arrival of Lt. White with a search warrant and upon his arrival, the appellant resisted execution of the warrant (R. 16, 18). No question was raised on the trial that no search warrant had been obtained and Lt. White was as available to the defense on subpoena as to the State. It was not incumbent upon the State to offer a search warrant into the evidence as an element of the offense to be proven on this trial. The only issue raised on the motion to suppress the evidence was that a proper search warrant was not secured setting forth the confiscated evidence on which the appellant was charged by indictment (R. 2). And it is admitted that such a search warrant was not secured.

Further, in their Statement of the Case at page 5 of their brief, it is said that twelve police officers had surrounded the private residence of the defendant, and forced their way into it. This is predicated upon the unsupported testimony of one of the attorneys for the defendant, Walter L. Greene, who "estimated" that there were that number (R. 30), and whose testimony shows that he went to the scene in an effort to discredit the police. He testified that he attempted to take pictures of the police (R. 33). His claim that he was denied entrance to the premises (App. Br. p. 5) is uncorroborated.

ARGUMENT.

I. THE PROVISION IN THE OHIO "OBSCENITY" STATUTE, REVISED CODE SECTION 2905.34, THAT "NO PERSON SHALL KNOWINGLY HAVE IN HIS POSSESSION OR UNDER HIS CONTROL" ANY OBSCENE BOOKS OR PICTURES, IS NOT UNCONSTITUTIONAL.

In view of this Court's decision in the *Roth* case, discussed more fully in the brief of the appellee on the Motion to Dismiss or Affirm, it seems to us that there is very little room for argument against the constitutionality of the legislation under which the appellant was charged and convicted.

State and federal statutes regulating obscenity, under which convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct, are not, for that reason, unconstitutional; obscenity not being constitutionally protected speech, consideration of matters as to "clear and present danger" are unnecessary. *Roth v. U. S., supra.*

Various reasons are given by the appellant to have this legislation declared unconstitutional. It is argued

that under the "old" law in Ohio, no one could possibly be accused under circumstances such as those in the case at bar. (App. Br. p. 7.) It is recognized that the legislature may create new offenses, in harmony with the power of the legislature to define criminal offenses and fix the penalty. 11 *Am. Jur.* Sec. 195, p. 898.

Whether or not the prohibition in such legislation is a valid exercise of the police powers of the State of Ohio to conserve public morality must be tested by the Constitution alone and how can it be logically argued that legislation having for its purpose the regulation of "obscenity" is incompatible with the provisions of the Constitution?

It is no answer to this question to argue that the legislation is unconstitutional because the appellant is innocent; that the obscene books and photographs were the possessions of a roomer and had been stored in the basement. The truth of that defense was a jury question on the charge contained in the indictment and is not the criterion for determining constitutionality.

The prohibition in the statute requiring as it does proof of scienter before a conviction can be had, contemplates proof of unlawful voluntary possession and control. Under the circumstances, the argument that anyone can be convicted, "no matter how innocent of purpose" (App. Br. p. 7) carries no weight. Further, the law recognizes a lawful possession as distinguished from an unlawful possession and the claim that police officers, court attaches or judges could be found guilty by reason of taking possession of such obscene matter for prosecution purposes has no merit.

It is begging the question too, on the issue of constitutionality, to argue that this obscene material belonged to a roomer and that the appellant could not destroy such property without being subject to prosecution for mali-

ciously destroying the property of another (App. Br. pp. 6, 8). There are no constitutional property rights involved in obscene matter, and no such prosecution could be had under the circumstances.

It is argued that in Section 2905.34 "we have such indefinite terms, with the cruelest and most unusual of punishments" (App. Br. p. 7). There is nothing indefinite in the language of the statute under which this appellant was indicted. That portion of the statute provides in clear and unmistakable language:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book" etc.

The statute provides for a fine or imprisonment, or both, but punishment by fine and imprisonment is not per se cruel and unusual; 15 *Am. Jur.*, Sec. 530, p. 176. The appellant was not given a seven year sentence as claimed, nor could any convicted defendant be given a seven year sentence under this statute. Under the laws of Ohio, more particularly R. C. Sec. 5143.05, the sentence of the court has to be a general one, not fixed or limited in duration. The term of such imprisonment is terminated by the Ohio Pardon and Parole Commission. Under such sentence, the punishment could be no more than one year with time off for good behavior.

For the first time in this Court, the appellant raises the issue that Sec. 2905.34 must be construed along with Sec. 3767.01 and infers that a class exemption is "brought into being" (App. Br. p. 8) by the second-class mail privilege exception in Sec. 3767.01. Since the Legislature could conclude that the Federal Obscenity Laws offer sufficient regulation for publications entered as second class matter by the Post Office Department, the separate classification of such publications is reasonable and valid. It is the law

of this State that the constitutional provision as to uniformity of operation does not preclude reasonable classification; *State ex rel. v. Thrasher*, 130 O. S. 434.

The claim is made that, at the discretion of the prosecutor, the appellant could have been prosecuted on a misdemeanor charge under R. C. Sections 2905.36, 2905.38 or 2905.39, and that such a power of discrimination makes R. C. Sec. 2905.34, which is a felony statute, unconstitutional. (App. Br. pp. 14-15.) None of the statutes cited cover the same acts for which the appellant was indicted in the instant case. The appellant cites *State v. Pirkey*, 281 P. 2d 698. The *Pirkey* case is based upon a statute delegating the arbitrary power of charging a felony or a misdemeanor on the same set of facts without setting a standard for making a distinction. The *Pirkey* case is not in point, under the circumstances.

The *Winters* case (333 U. S. 507) is discussed in the brief of the defense and it is argued that they cannot distinguish the Ohio statute from that held invalid in the *Winters* case (App. Br. p. 13). The portion of the New York statute under consideration by this Court and struck down in the *Winters* case, made it an offense to publish or distribute publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." This Court held, three justices dissenting, that such provision did not set up a sufficiently definite standard of conduct. That portion of the statute is not in issue in the instant case.

> "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected." 11 *Am. Jur.* 834, Sec. 152.

II. THE SENTENCE WAS NOT UNCONSTITUTIONAL.

It is argued that the appellant's sentence violated Article I, Section 9 of the Constitution of the State of Ohio, and Amendment VIII of the United States Constitution as constituting cruel and unusual punishment. She was, as heretofore stated in this brief not given a seven year sentence. The sentence of the trial court was within the limit fixed by the statute, is not cruel and unusual and is therefore valid.

In 15 *Am. Jur.*, pp. 155-156, Sec. 507, it is stated:

> "Subject only to constitutional limitations, such as those prohibiting cruel and unusual punishment, excessive fines, the enactment of ex post facto laws, the imposition of double jeopardy, and those guaranteeing equal protection of the laws, due process of law, etc., the legislature may fix the punishment for crime as it sees fit. * * *"

Further, in 15 *Am. Jur.*, p. 157, Sec. 508, it is stated:

> "The general principle that a state has full control over matters of procedure in its courts has received liberal interpretation in its application to statutes regulating the punishment of persons convicted of crime. While the legislatures are frequently restrained by provisions in state constitutions in this respect, so far as the limitations as to due process of law are concerned, the states have the general power to fix and determine penalties and punishments for crime. For example, a state may provide that in the case of a certain specified crime, punishment by death by electrocution shall be inflicted."

The appellant continues to argue on this issue that had she destroyed this obscene matter she would have been subject to prosecution for malicious destruction of property. There being no constitutional guaranty of a

property right in obscene material, there would be no private property right upon which to base a prosecution for malicious destruction of property of another.

III. THE CONDUCT OF THE POLICE IN OBTAINING THE EVIDENCE WAS NOT UNCONSTITUTIONAL.

The defense claim that the appellant's constitutional rights were disregarded by the police in obtaining the evidence in this case, and cite *Rochin vs. California*, 342 U. S. 165, in support of that contention. No physical examination of the appellant was made to secure the evidence which was the basis for this prosecution, as was done in the *Rochin* case. It is therefore inapplicable, and the Supreme Court of Ohio so held in its opinion.

The Record establishes that there was no misconduct on the part of the police in securing the evidence. The incident which took place between the appellant and the police prior to the search was brought about through no fault of the police. By her conduct, the appellant provoked the situation which made it necessary for the police to handcuff her if a peaceable search was to be conducted.

Under the judicial rules of evidence prevailing in the courts of the State of Ohio, the trial court in this case and the appellate courts on review had every right to rely upon the authority of the *Lindway* case, *State v. Lindway*, 131 Ohio St. 166, 2 N. E. (2d) 490 (appeal dismissed and certiorari denied, 299 U. S. 506, 81 L. Ed. 375, 57 S. Ct. 36) in holding that the criminal evidence obtained in this search was competent and admissible on the trial.

In *Irvine v. People of State of California*, 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561, the main opinion states, 347 U. S., p. 134, 74 S. Ct., p. 384, 98 L. Ed., p. 570:

"The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions."

Again, in 347 U. S., pp. 136, 137, 74 S. Ct., p. 385, 98 L. Ed. p. 571, it is said in the main *Irvine* opinion:

"Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them."

And in *Wolf v. Colorado*, 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359, this Court held:

"4. In a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Rules of evidence apply alike to all criminal cases regardless of the facts and circumstances in a particular case. To argue then that a different rule of evidence or a modification of the non-exclusionary rule of evidence adopted by the Courts of the State of Ohio should apply

to the instant case is an attempt to open the door to an arbitrary application of a judicially created rule of evidence in Ohio.

IV. THE SENTENCE OF THE COMMON PLEAS COURT PRESENTED NO BASIS FOR REDUCTION BY THE COURT OF APPEALS ON REVIEW.

It is argued that the Court of Appeals of Cuyahoga County, Ohio held that it could not review the sentence of the trial court in this case (App. Br. p. 22). There was no such holding.

The statute under which the appellant was convicted and sentenced calls for imprisonment or a fine, or both. The trial court sentenced the appellant to the Ohio Reformatory for Women. The fact that the trial court had discretion under the statute to impose imprisonment or a fine does not render the punishment cruel and unusual so as to present a basis for a reduction by the Court of Appeals. The Court of Appeals properly held under the circumstances, that the question of punishment is within the exclusive jurisdiction of the trial court.

As stated heretofore, the sentence of the trial court was within the limit fixed by the statute, is not cruel and unusual and is therefore valid. This was not the exercise of any arbitrary power on the part of the trial court and under the circumstances, there was no reason for the Court of Appeals to reverse the sentence.

V. THE CHARGE OF THE TRIAL COURT DID NOT VIOLATE ANY OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANT.

It is contended that the trial court violated the due process clause and the appellant's right to trial by jury, by instructing the jury that:

"The law presumes that a sane person intends the ordinary consequences of his own voluntary acts." (R. 65.)

This instruction was a part of the following instruction given to the jury:

"In order to find the defendant, Dollree Mapp, guilty as charged in the indictment, the State must prove beyond a reasonable doubt each and all of the following elements, which I shall enumerate:

"(1) * * *

"(2) That the act was done unlawfully, that is, in violation of a statute of Ohio; and that it was done knowingly, that is, voluntarily, of one's own choice, not accidentally. This signifies an act of the will, an intention to possess and have under one's control the things alleged in the indictment, which knowledge and intention must have been present at the time when the act complained of was done. The law presumes that a sane person intends the ordinary consequences of his own voluntary acts." (R. 65).

The defense state that this was not a case admitting of any charge as to presumption, for both sides had given evidence (App. Br., p. 23). It is a general presumption of law that a sane person intends the natural and probable consequences of his voluntary acts. This is a presumption of law, not a presumption of fact, and the trial court was not, by such instruction, telling the jury that they could presume any facts in the absence of evidence.

The cases cited by the appellant deal with the place and position of a presumption of fact in the absence of evidence, and are inapplicable to the instruction of the court in the instant case.

Complaint is made that the trial court unfairly instructed the jury that one who deposits articles in a place

of concealment may still be deemed to have them in his possession. (App. Br. p. 25). It is further contended that the trial court misled the jury in using such words as "detaining" and "holding" (App. Br. p. 25).

None of the obscene material in this case was found on the appellant's person. The State's evidence established that all of it was found in the appellant's bedroom. The defense was that it was found in the basement and belonged to a roomer. The trial court was required to define to the jury what possession and control meant, and in that connection said:

> "* * * 'Possession' means the act or state of detaining a thing; it is the act of holding or keeping it. Now, such detention does not mean that it is necessary always to have in one's sight the thing possessed. For example, one who deposits articles in a place of concealment may still be deemed to have them in his possession. To have something under one's control is to have the present right and power to do with it as one will.
>
> Neither possession or control necessarily means ownership. If a person possesses something it does not necessarily mean that he owns it. The test is whether or not the defendant had some degree of possession and control over the material as alleged in the indictment." (R. 65-66).

There is no showing in the brief of the defense that the appellant was prejudiced by these instructions or that the court's charge was in any way unfair, misleading or incorrect. It may be pointed out too, that not only was there no general exception to the charge taken, but upon completion of the instructions, the defense was asked if there was anything further and stated: "Nothing on behalf of the defense, your honor." (R. 68.)

CONCLUSION.

The Supreme Court of Ohio affirmed the judgment of the trial and appellate courts in the case. The fact that under the Ohio Constitution a simple majority of the State Supreme Court cannot hold a statute to be unconstitutional and void, without the concurrence of the Court of Appeals, is a lawful limitation on the power of the State Judiciary and is not in violation of the Fourteenth Amendment. *Toth v. Silbert, et al.*, Civil Action No. 36089, U. S. District Court, Northern District of Ohio, Eastern Division, per Circuit Judge Weick and District Judges Kalbfleish and Jones; decided May 16, 1960.

A state constitutional provision that no law shall be held unconstitutional by the supreme court of the state without a concurrence of at least all but one of the judges does not violate the due process clause of the 14th Amendment to the Federal Constitution, nor does it deny the equal protection of the laws. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District for Summit County*, 281 U. S. 74, decided March 12, 1930.

In view of all of the foregoing and what has been said on the issues raised in this case, in our Brief filed with the Motion to Dismiss or Affirm, we respectfully submit that the Motion to Affirm should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,

Defendant-Appellant.

APPEAL FROM SUPREME COURT OF OHIO.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

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BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

PRELIMINARY STATEMENT.

This brief is submitted on the merits of the Appeal. Both Appellant and Appellee have consented to the filing of this brief *amici curiae* by the American Civil Liberties Union and the Ohio Civil Liberties Union.

The Ohio Civil Liberties Union is the Ohio Chapter of the American Civil Liberties Union, whose membership is distributed throughout the United States. They are concerned with the protection of the Civil Liberties of all persons, whether or not they agree with their views.

This case involves the constitutionality of Section 2905.34 Revised Code of Ohio particularly that portion of it which prohibits the mere possession of obscene literature. It is here contended that the section under which defendant-appellant was convicted violates the Equal Pro-

tection Clause and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. It is further contended that the statute constitutes an unwarranted invasion of the right to read and the right of privacy as well. These questions have never been determined by the United States Supreme Court.

By attacking the constitutionality of the statute, the Ohio Civil Liberties Union does not intend to suggest that it favors obscenity and pornography. To the contrary, its position coincides with that of Judge Frank in *U. S. v. Roth*, 237 F. 2nd 796, 804 (2d cir. 1956), when he said:

> "As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing; I happen not to be interested in so-called 'pornography' * * *."

Except as otherwise indicated, all emphasis has been supplied.

ARGUMENT.

A. THE STATUTE UNDER WHICH DEFENDANT APPELLANT WAS CONVICTED IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DUE PROCESS.

Defendant-Appellant was indicted and convicted under Section 2905.34, OHIO REVISED CODE, which reads in pertinent part as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd or lascivious book * * * print, picture * * *."

It is submitted that the portion of the statute under which defendant-appellant was convicted violates the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

1. General Constitutional Standards for Statutes Enacted Pursuant to the Police Power.

It is well established that in order to meet the test of due process, legislation enacted by the state pursuant to the police power must have a purpose which is in fact public and reasonably related to some legitimate subject of governmental action; it must be reasonably adapted to the accomplishment of that purpose, and must not be arbitrary or excessive. *Pierce v. Society of Sisters*, 268 U. S. 510, 535, *Treigle v. Acme Homestead Ass'n*, 279 U. S. 189, 197; *Louis K. Liggett Company v. Baldridge*, 278 U. S. 105, 111, 113 (1928); *Eubank v. City of Richmond*, 226 U. S. 137, 144.

It is abundantly clear that statutes enacted to advance the public health, safety, morals, prosperity, welfare or convenience have a valid and constitutional legislative purpose.

Eubank v. City of Richmond, 226 U. S. 137, 142. And it is not at this late date denied that the State may legislate in the area of morality. *L'Hote v. New Orleans*, 177 U. S. 587.

No one would argue that the improvement of general morality is not a desirable social result. But what, specifically, is the purpose of a statute which prohibits the *mere possession* of obscene literature, without more, by an adult not shown to be abnormal in any respect?

There would seem to be only three possible purposes:

(1) To prevent arousing in the possessor intense sexual appetites which will result in overt anti-social behavior.

(2) To prevent the production of abnormal, depraved and anti-social sexual attitudes in the possessor which will result in overt anti-social behavior.

(3) To discourage thoughts of sexual matters by the possessor.

It is conceded here that each of the first two possibilities provides a valid legislative purpose under the police power for the enactment of prohibitive legislation. It is denied, however, that the third possible purpose is in any way related to a proper legislative subject because legislation to control thoughts and attitudes alone is repugnant to democratic concepts. It will be assumed, therefore, throughout this discussion that the legislature's purpose in enacting Section 2905.34 OHIO REVISED CODE was to prevent abnormal or depraved sexual attitudes and overt anti-social behavior, was, consequently, valid and therefore meets the first of the constitutional requirements of due process.

2. The Legislative Means Adopted in Section 2905.34 Ohio Revised Code is Not Reasonably Adapted to the Accomplishment of the Legitimate Ends in View.

In addition to a legitimate purpose, due process requires that a statute enacted pursuant to the police power adopt a means of accomplishing such purpose which bears a real and substantial relation to the legislative goal. *Louis K. Liggett Company v. Baldridge*, 278 U. S. 105, 111; *Treigle v. Acme Homestead Ass'n.*, 297 U. S. 189, 197.

Assuming that the legislative object was to prevent overt anti-social behavior and abnormal or depraved sexual attitudes, what means did the legislature provide in Section 2905.34, Ohio Revised Code to accomplish this object? Among other provisions, it made mere possession of obscene matter by a normal, healthy adult a crime. Not "possession with intent to sell," nor "possession with intent to distribute to children"—but *mere possession, for whatever purpose*, constitutes the offense.

It is submitted that this provision of the statute is unreasonable and arbitrary, and that it is not related in any manner to the legitimate purposes of the statute, because it has never been demonstrated that there is any relationship, direct or remote, between the possession of obscene literature and depravity or overt anti-social conduct.

Some of the forward looking decisions have noted this lack of relationship.

Judge Frank, in a concurring opinion in *U. S. v. Roth*, 237 F. 2d 796, 804 (2d cir. 1956), after analyzing the sociological studies on this point, said, at page 812:

> "To date there exist * * * no thorough-going studies by competent persons which justify the conclusion that normal adults' reading or seeing of the 'obscene' probably induces anti-social conduct. Such competent studies as have been made do conclude that so

complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that 'obscenity' represents a ponderable causal factor in sexually deviant adult behavior * * * What little competent research has been done, points definitely in a direction precisely opposite to that assumption."

Judge Bok, in a landmark decision dealing with the relationship between sexually deviant behavior and obscene literature, *Commonwealth v. Gordon*, 66 Pa. D & C 101 (1949), in distinguishing the cause-and-effect relationship between the purposes and means employed in obscenity statutes from other, valid statutes enacted within the police power, said:

"There are various types of cases in which [the dangerous effect of the prohibited behavior] is clear because the need is clear. The police power operates in pure food cases because people can be injured or killed unless there is regulation; in weights and measures cases because of the ease with which the consumer can be cheated, and in conventional crimes because of the threat to persons and property." p. 154.

But, continued Judge Bok:

"A book, however sexually impure and pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurement into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place." p. 153.

"* * * the public does not read a book and simultaneously rush by the hundreds into the streets to engage in orgiastic riots." p. 154.

And again, at page 155:

"We might remember the words of Macauley:

> 'We find it difficult to believe that in a world so full of temptation as this, any gentleman whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.'

"Substitute the names of the books before me for "Aristophanes" and "Juvenal," and the analogy is exact."

Judge Bok considered the problem of different individual sensual levels of stimulation as a deterring factor in finding a cause-and-effect relationship between obscenity and depravity. He said, on this point:

> "If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field. The professional answer that is suggested is the one general compromise—that the appetite of sex is old, universal and unpredictable, and that the best we can do to keep it within reasonable bounds is to be our brother's keeper and censor, because we never know when his sensuality may be high. The does not satisfy me, for in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth v. Gordon*, 66 Pa. D & C 101, 137 (1949).

The sociological studies on the relationship between obscenity and depravity have been unanimous in denying that proof exists of any such relationship.

For example, see Lockhart and McClure: *Obscenity and the Courts*, 20 LAW AND CONTEMP. PROBS. 587, 595 (1955) in which the authors state

> "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study of effect of sex literature upon sexual behavior."

See also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954). The results of this study are reported in the appendix to Judge Frank's concurring opinion in *Roth v. U. S., supra.* A summary of the study by the author appears in full in Appendix A, *infra*, page 22.

Noteworthy also is the summary of scientific studies in Lockhart and McClure: *Obscenity and the Courts, supra*, page 596. It is quoted in full in Appendix B, *infra*, page 25.

For other studies and analyses of the problem of causation, see Alpert: *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1942); Watson: *Some Effects of Censorship upon Society*, 5 SOCIAL MEANING OF LEGAL CONCEPTS 73 (1953).

The results of these sociological and psychological studies may be summarized as follows:

(1) There has been no positive finding by anyone that possession and/or reading of obscene literature by adults leads to depravity and/or overt antisocial conduct. What evidence has been assembled suggests exactly the opposite.

(2) While children may be more susceptible to accidental influences from literature than adults, there is no research evidence available that there is even a causal relationship between obscenity and juvenile delinquency. The evidence which is available suggests the very contrary that juvenile delinquents seldom read anything and that children who read are not often juvenile delinquents.

In the face of these studies, it can scarcely be urged that there is a clear relation, as required for constitutionality, between the purpose of Section 2905.34, OHIO REVISED CODE (the prevention of depraved sexual attitudes and of overt anti-social behavior) and the means provided by the statute (the prosecution of normal, healthy adults for the mere possession of obscene literature).

It is submitted that the prohibition of mere possession of obscene literature by an adult is in no way related to the control of depravity and that Section 2905.34, OHIO REVISED CODE is constitutionally defective for this reason.

3. The Legislative Means Adopted to Accomplish the Purposes of Section 2905.34, Ohio Revised Code, Interfere with Private Rights to a Greater Degree than the Necessities of the Situation Require.

The third test of constitutional validity is that the means employed in the statute must not be excessive. What private rights are affected by the operation of Section 2905.34, Ohio Revised Code?

a. Section 2905.34, Ohio Revised Code interferes unnecessarily with the constitutional right to read.

This Court in *Butler v. Michigan*, 352 U. S. 380 has recently made explicit the fact that the public is guaranteed the Right to Read by the Fourteenth Amendment.

In that case, this Court struck down a Michigan statute which made it a crime to make available to the general public books having a potentially deleterious influence upon youth. Justice Frankfurter, speaking for a unanimous Court, said:

> "The State insists that, by this quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. * * *
>
> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." 352 U. S. 380, 383.

It is here contended that the public's *Right to Read* is violated by a statute which makes possession by adult, without more, of obscene literature a crime, and that such infringement of this right is greater than is reasonably necessary to accomplish the legitimate purposes of the state in the valid exercise of its police power. It is submitted further that the *Right to Read*, if it is to have any meaning at all, must include the *Right to Possess* literature as well.

It is not argued here that there is a right to sell, disseminate or distribute obscene literature or to pass such material out to children; if the state had confined its regulation of obscene literature to sale, dissemination or distribution to children, it could not be argued that the

right to read was involved or violated. But the state did not so limit its statute and it is for that reason unconstitutional.

B. SECTION 2905.34 REVISED CODE INTERFERES UNNECESSARILY WITH THE CONSTITUTIONAL RIGHT OF PRIVACY.

It is urged that Section 2905.34 REVISED CODE be struck down by this Court as an unconstitutional attempt to use the police power to invade the privacy of the individual.

The right of privacy of the defendant, guaranteed by the Fourth and Fourteenth Amendments of the Federal Constitution, was invaded by her arrest and conviction under the Ohio Obscenity Statute for mere possession of obscene books and photographs.

The general rule relating to this right of privacy is stated in 16 *C. J. S.*, Constitutional Law, Section 574 at p. 606:

> "Right of privacy is guaranteed by state and federal constitutional provisions declaring that no person shall be deprived of liberty except by due process of law. * * * The security of one's privacy against arbitrary intrusion by the police is basic to a free society, and is, therefore, implicitly in the concept of ordered liberty and as such enforceable against the states through the due process clause and were a state affirmatively to sanction such police intrusion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Perhaps the best enunciation of this constitutional guarantee is by United States Supreme Court Justice Frankfurter in *Frank v. Maryland*, 359 U. S. 360, p. 362:

> "We have said that the security of one's privacy against arbitrary intrusion by the police is fundamental to a

free society and as such protected by the Fourteenth Amendment. *Wolf v. Colorado*, 338 U. S. 25, 27, Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests."

And on page 365:

"Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds."

Thus it appears that the right of privacy is given protection under the Fourth Amendment of the Constitution from Federal officials, and under the Fourteenth Amendment of the Constitution from arbitrary interference of State officials.

What is this right of privacy?

It has been defined by Lee Nizer in 39 MICHIGAN LAW REVIEW, at 528 as follows:

"It is the right of an individual to live a life of seclusion and anonymity free from the prying curiosity which accompanies both fame and notoriety. It presupposes a desire to withdraw from the public gaze, to be free from the insatiable interest of the great mass of men

in one who has risen above or fallen below the mean. *It is the recognition of the dignity of solitude of the majesty of man's free will and the power to mold his own destiny, of the sacred and inviolate nature of one's innermost self.*"

The common law has long recognized that certain rights exist and that certain relationships are permitted free from invasion from governmental interference. The personal rights include freedom of speech, press, assembly and religion. Additionally there is the constitutional privilege of a person accused of a crime not to be compelled to testify against himself. The relationships accorded protection are those involving attorney and client, physician and patient, priest and confesser.

As the above rights were one by one being given protection, and the relationships were gaining acceptance, it is only natural that courts should give similar recognition to the sanctity of the individual's right of privacy.

In 39 MICHIGAN LAW REVIEW, at 528, it is further said:

"Progress in this direction indicated that in the natural course of events the common law would expand its scope to include the right of privacy. It is but a short step, for example, from an injunction against the publication of a man's private letters to an injunction against the publication of his picture. One's thoughts, emotions and sensations are as much a part of him as his arms and legs. Not all the pain, pleasure and profit of life come from physical things; man's spiritual nature, too requires legal recognition."

"Five hundred years of legal history reveal the progressive growth of the 'right to inviolate personality.' What were originally deemed the minimum rights of man ordained by nature itself have been expanded to include newer concepts of man's right to enjoy un-

molested a fuller and richer life more consonant with the dignity of human existence."

Since the time of the Warren-Brandeis article on the Right to Privacy in 4 HARVARD LAW REVIEW 192, our Courts have recognized the civil remedy which an individual has against another for an unreasonable invasion of his privacy. Surely, an individual is no less entitled to the enjoyment of this right of privacy safe from abitrary interference from governmental agencies.

The right of a citizen to possess and control books and photographs, even if they be obscene, is a right such citizen is entitled to enjoy without interference by police officers.

Admittedly, there may be certain instances where the private possession of obscene literature and photographs would lead to unlawful and socially undesirable practices, and it is possible that the exercise of police power in seizing such materials might in some few instances eliminate the occasion of such illegal or undesirable practices. However, the danger to society arising out of sanctioning police interference in the private lives of our citizens far outweighs any good that might be derived from uncovering and destroying allegedly obscene material.

No doubt the state which George Orwell so eloquently described in his book *Nineteen Eighty Four* was a state in which human defection was kept to the absolute minimum —a state in which the supervision over the individual by Big Brother and colleagues was so comprehensive that the citizens within the community found it impossible to do other than that which was socially good. But this state in intruding itself into the private lives of the members of Orwell's mythical society had, by its regimentation, all but destroyed that divine spark which separates the human being from the animal kingdom. Under the watchful eye

of Big Brother the citizen may have become more efficient, but the price of such efficiency was the loss of all human dignity.

The danger to individual freedom which would come about were the police authorities able to arrest and detain persons for private possession of obscene material far outweighs any benefit that would accrue to society if all such materials were seized and destroyed.

There appears to be a dearth of cases dealing with violation of due process or violation of the right of privacy in situations similar to the one at bar. The only utterance on the subject by an Appellate Tribunal of any State as well as the Federal Government has been that of the Ohio Supreme Court in the within case. *State of Ohio v. Mapp*, 170 O. S. 427 (1960).

The absence of these cases may be attributed to the unusual and far reaching character of the Ohio Statute on this subject. Most state statutes punish only the exhibition or sale of obscene matter but not the mere possession thereof.

Perhaps the closest case in point is *DiMello v. Gabrielson*, 34 Hawaii 459 (1938), where it was held that it is a violation of the due process clause of the Federal Constitution for a police officer to compel a person who is not under arrest on a criminal charge to submit to the taking of his finger prints and photograph.

The Court said on page 465:

> "Human freedom is too precious a heritage and has been achieved at too great a cost of blood and suffering to be jeopardized by the acts of police authorities done without the sanction of law and in disregard of constitutional mandate."

We believe that the Ohio Statute should be declared unconstitutional. Perhaps the best expression of this feel-

ing is to be found in the dissenting opinion of Justice Brandeis in *Olmsted v. United States*, 277 U. S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

C. SECTION 2905.34 READ TOGETHER WITH SECTIONS 2905.37 AND 3767.01, REVISED CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment to the United States Constitution requires that laws apply equally to all persons similarly situated. Legislatures have the inherent right and power to make classifications, but such classifications must be based upon real and substantial distinctions in the nature of the class or classes upon which the law operates

Missouri ex rel. Gaines v. Canada, 305 U. S. 337:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins*, 118 U. S. 356; *Missouri ex rel. Gaines v. Canada*, 305

U. S. 337 (cited in quotation) *Skinner v. Oklahoma*, 316 U. S. 535."

It is submitted that Section 2905.37 REVISED CODE, and the last sentence in Section 3767.01 C, REVISED CODE, do create unreasonable and arbitrary classifications in exempting from the operation of Section 2905.34, REVISED CODE, the following persons similarly situated with other persons whose conduct is deemed criminal thereby:

1. Druggists.
2. Persons belonging to "bonafide associations for the advancement of art," or whose work is made, published and distributed by such association.
3. Art associations not organized for profit.
4. Newspapers, magazines, or other publications entered as second class matter by the Post Office Department.

Section 2905.37 provides in part:

"Sections 2905.33 to 2905.36 inclusively of the Revised Code do not affect * * * *druggists in their legitimate business*, nor do they affect the publication and distribution of bonafide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is *made, published, and distributed by a bonafide association of artists or an association for the advancement of art* whose demonstrated purposes does not contravene Sections 2905.06 and 2905.04 inclusive, of the Revised Code, and which is *not organized for profit.*"

Section 3767.01 C provides in part:

"* * * this section and Sections 2905.34 * * * 2905.37 * * * of the Revised Code shall not affect * * * *any newspapers, magazine, or other publication entered as second class matter by the Post Office Department.*"

When a statute grants a privilege or immunity to one and denies it to another in the same class it denies equal protection of the laws.

That the classifications listed above make an act penal if done by one or not so if done by another, can be illustrated by the following examples:

(1) It is common knowledge that druggists in their legitimate business handle newspapers, magazines, paperback books and the like. A druggist handling material deemed obscene is not affected while anybody else handling the same material is guilty of a crime. In fact the druggist would be immune from prosecution but his customer would not be.

(2) A person may create an article which if "made, published, and distributed by a bonafide association of artists or an association for the advancement of art * * *" would not be affected by Section 2905.34 R. C. However, if he created the same article *independently*, he would be affected.

(3) The Association would be affected if the same person cited above, even if he belonged to an association was *for profit* instead of being *non-profit*. The U. S. Supreme Court in *Durstyn, Inc., v. Wilson*, 343 U. S. 495 at pp. 501-2 indicated that the fact that motion pictures were produced for profit had no bearing on whether they were entitled to the protection of the First Amendment. Similarly, with the present statute, it is difficult to find any reason why the same conduct done for profit should constitute a crime when, if not done for profit, it would not.

(4) A newspaper, magazine, or other documents containing obscene matter, if entered as 2nd class mail would be free from the penalties imposed by Section 2905.34, REVISED CODE. Yet, if the same matter were printed elsewhere or sent by any other class of mail it would fall under Section 2905.34. The California Supreme Court declared unconstitutional a Los An-

geles County ordinance which attempted to prohibit the sale and distribution of crime comic books on the ground that the ordinance unreasonably exempted certain types of comic books and strips. *Katzev v. Los Angeles,* 341 P. 2nd 310. Included within the exemptions in the ordinance was one which exempted those accounts of crime which appeared in newspapers of general circulation.

The Court stated on page 316:

"Because these exemptions are not related to the purported purposes of the legislation they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws.

"Where the legislative classification is unreasonable, the courts will invalidate the law. In *Franchise v. Motor Freight Association v. Seavey,* 196 Cal. 77, 81, 235. P. 2d 1,000, 1,002, we said that 'a Statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger class of persons all of whom stand in the same relation to the privileges granted and between whom, and the persons not so favored, no reasonable distinction or substantial developments can be found to justify the inclusion of the one and the exclusion of the other.' "

In *Skinner v. Oklahoma,* 316 U. S. 535 the Court struck down a state sterilization statute because it applied to habitual criminals having committed grand larceny but not those having committed embezzlement although the statutes made both crimes felonies and provided the same punishment for both. The Court stated that the "* * * Nature of the crimes is basically the same * * *" 539.

Similarly, under Section 2905.34, REVISED CODE, the conduct, i.e. possession of obscene material, is intrinsically the same. Thus, it should be criminal whether possessed by a druggist, non-profit art association, or sent in a newspaper or other pub-

lication entered as second class mail. There seems to be no social good to be derived from granting immunity to these classes as there is from granting it to those teaching in medical colleges, printing it in medical books or doctors using it in the regular practice of medicine. Since the classifications are without real substance or distinction, the statute must fall as being a denial of equal protection of the laws.

D. USE OF EVIDENCE OBTAINED IN AN ILLEGAL SEARCH AND SEIZURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf v. Colorado*, 338 U. S. 25. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings.

CONCLUSION.

This Court has before it a statute which gives to the state excessive police powers. This statute, which prohibits mere possession of obscene literature or photographs, permits the state unfairly and arbitrarily to intrude itself into the private lives of its citizens. Because of the exemptions granted, it denies persons the equal protection of the laws. This Court should reverse the conviction because the statute under which defendant-appellant was convicted is constitutionally defective and because it would be an unconstitutional deprivation of the liberty of defendant to apply such statute to the facts of her case.

Respectfully submitted,

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APPENDIX A.

Jahoda and Staff of Research Center for Human Relations, New York University: The Impact of Literature, a Psychological Discussion of Some Assumptions in the Censorship Debate (1954).

"Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to anti-social actions, particularly to juvenile delinquency. An examination of the pertinent psychlogical literature has led to the following conclusions:

1. There exists no research evidence either to prove or to disprove this assumption definitively.

2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.

3. In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter. Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

Where childhood experiences and subsequent events have combined to make deliquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or *it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action.* There is no empirical evidence in either direction.

4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggest that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations.

"*Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature.* This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in children those qualities which drove them to the comic book world to begin with: an inability to face the world, apathy, a belief that the individual is hopelessly impotent

and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

"It should be noted that insofar as causal sequence is implied, *insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects.* Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

APPENDIX B.

Lockhart and McClure: Obscenity and the Courts, 20 L. and Contemp. Probs. 587, 596 (1955).

"(1) Scientific studies of juvenile delinquency demonstrate that *those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent.* The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. *Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read.*

"(2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who knew so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended.

"(3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that *the*

influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1960.

Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[June 19, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St. 427–428, 166 N. E. 2d 387, 388.

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney,

[1] The statute provides in pertinent part that

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture. . . .

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened [2] and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she has been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living

[2] A police officer testified that "we did pry the screen door to gain entrance"; the attorney on the scene testified that a policeman "tried to kick in the door" and then "broke the glass in the door and somebody reached in and opened the door and let them in;" the appellant testified that "the back door was broken."

room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "there is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St., at 430, 166 N. E. 2d, at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to offend 'a sense of justice,' " but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St., at 431, 166 N. E. 2d, at 389–390.

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf* v. *Colorado*, 338 U. S. 25 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. On this appeal, of which we have noted probable jurisdiction, 364 U. S. 868, it is urged once again that we review that holding.[3]

[3] Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*.

I.

Seventy-five years ago, in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), considering the Fourth [4] and Fifth Amendments as running "almost into each other" [5] on the facts before it, this Court held that the doctrines of those Amendments

> "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

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[4] "The right of the people to be secure in their persons, houses, not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5] The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in *Entick* v. *Carrington*, 19 Howell's State Trials, col. 1029, the *Boyd* court drew heavily. Lord Camden had noted, at col. 1073:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

The Court noted that

> "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights the Court gave life to Madison's prediction that "independent tribunals of justice : . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong. 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638.

Less than 30 years after *Boyd*, this Court, in *Weeks* v. *United States*, 232 U. S. 383 (1914), stated that

> "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At pp. 391–392.

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far

as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At p. 393.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." At p. 398. Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." *Wolf* v. *Colorado*, *supra*, at 28. This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ." *Weeks* v. *United States*, *supra*, at 392, and that such evidence "shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, *supra*, at 392.

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. In *Byars* v. *United States*, 273 U. S. 28 (1927), a unanimous Court declared that "the doctrine [can-

not] . . . be tolerated *under our constitutional system*, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." At pp. 29–30 (emphasis added). The Court, in *Olmstead* v. *United States*, 277 U. S. 438 (1928), in unmistakable language restated the *Weeks* rule:

> "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." At p. 462.

In *McNabb* v. *United States*, 318 U. S. 332 (1943), we note this statement:

> "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. . . . *Boyd* v. *United States* . . . *Weeks* v. *United States* . . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified' . . . or 'who have been unlawfully held incommunicado without advice of friends or counsel' . . . ." At pp. 339–340.

Significantly, in *McNabb*, the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue [for] . . . [t]he prin-

ciples governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." At pp. 340–341.

II.

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf* v. *Colorado*, *supra*, again for the first time,* discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

> "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." At p. 28.

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause," cf. *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." 338 U. S., at 27–29. The Court's reasons for not considering essential to the right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouch-

* See, however, *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58 (1914), and *Adams* v. *New York*, 192 U. S. 585 (1904).

safed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive" (at p. 29); and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." At pp. 31–32. While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins* v. *United States*, 364 U. S. 206, Appendix, pp. 224–232 (1960). Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955). In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." [7] 338 U. S., at 30. The experience of

[7] Less than half of the States have any criminal provisions relating directly to unreasonable searches and seizures. The punitive sanctions of the 23 States attempting to control such invasions of the right of privacy may be classified as follows:

Criminal Liability of Affiant for Malicious Procurement of Search Warrant.—Ala. Code, 1958, Tit. 15, § 99; Alaska Comp. Laws Ann., 1949, § 66-7-15; Ariz. Rev. Stat. Ann., 1956, § 13-1454; Cal. Pen. Code § 170; Fla. Stat., 1959, § 933.16; Ga. Code Ann., 1953.

California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. See *Irvine* v. *California*, 347 U. S. 128, 137 (1954).

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "[t]he Federal rule

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§ 27-301; Idaho Code Ann., 1948, § 18-709; Iowa Code Ann., 1950, § 751.38; Minn. Stat. Ann., 1947, § 613.54; Mont. Rev. Codes Ann., 1947, § 94-35-122; Nev. Rev. Stat. §§ 199.130, 199.140; N. J. Stat. Ann., 1940, § 33:1-64; N. Y. Pen. Law § 1786, N. Y. Code Crim. Proc. § 811; N. C. Gen. Stat., 1953, § 15-27 (applies to "officers" only); N. D. Century Code Ann., 1960, §§ 12-17-08, 29-29-18; Okla. Stat., 1951, Tit. 21, § 585, Tit. 22, § 1239; Ore. Rev. Stat. § 141.990; S. D. Code, 1939 (Supp. 1960), § 34.9904; Utah Code Ann., 1953, § 77-54-21.

Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit.—N. C. Gen. Stat., 1953, § 15-27; Va. Code Ann., 1960 Replacement Volume, § 19.1-89.

Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant.—Fla. Stat. Ann., 1944, § 933.17; Iowa Code Ann., 1950, § 751.39; Minn. Stat. Ann., 1950, § 613.54; Nev. Rev. Stat. § 199.450; N. Y. Pen. Law § 1847, N. Y. Code Crim. Proc. § 812; N. D. Century Code Ann., 1960, §§ 12-17-07, 29-29-19; Okla. Stat., 1951, Tit. 21, § 536, Tit. 22, § 1240; S. D. Code, 1939 (Supp. 1960), § 34.9905; Tenn. Code Ann., 1955, § 40-510; Utah Code Ann., 1953, § 77-54-22.

Criminal Liability of Officer for Search with Invalid Warrant or no Warrant.—Idaho Code Ann., 1948, § 18-703; Minn. Stat. Ann., 1947, §§ 613.53, 621.17; Mo. Ann. Stat., 1953, § 558.190; Mont. Rev. Codes Ann., 1947, § 94-3506; N. J. Stat. Ann., 1940, § 33:1-65; N. Y. Pen. Law § 1846; N. D. Century Code Ann., 1960, § 12-17-06; Okla. Stat. Ann., 1958, Tit. 21, § 535; Utah Code Ann., 1953, § 76-28-52; Va. Code Ann., 1960 Replacement Volume, § 19.1-88; Wash. Rev. Code §§ 10.79.040, 10.79.045.

as it stands is either too strict or too lax." 242 N. Y., at 22, 150 N. E., at 588. However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, *Elkins* v. *United States*, *supra*; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, *Jones* v. *United States*, 362 U. S. 257, 266–267 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, *Rea* v. *United States*, 350 U. S. 214 (1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine." *United States* v. *Rabinowitz*, 339 U. S., 56, 63 (1950).

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III.

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [*Weeks*]

rule." *Irvine* v. *California, supra,* at 134. There again it was said:

> "Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment." *Ibid.*

And only last Term, after again carefully re-examining the *Wolf* doctrine in *Elkins* v. *United States, supra,* the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in *Wolf* "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the *Weeks* case. At p. 213. At the same time the Court pointed out, "the underlying constitutional doctrine which *Wolf* established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested . . . ." *Ibid.* The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth; it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important consti-

tutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States, supra,* at 217.

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf* v. *Colorado, supra,* at 27. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers* v. *Richmond,* 365 U. S. 534 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do

enjoy an "intimate relation" * in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram* v. *United States*, 168 U. S. 532, 543–544 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman* v. *United States*, 322 U. S. 487, 489–490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. *Rochin* v. *California*, 342 U. S. 165, 173 (1952).

V.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins*, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." 364 U. S., at 221. Such a conflict, hereafter needless, arose this very Term, in *Wilson* v. *Schnettler*, 365 U. S. 381 (1961), in which, and in spite

* But compare *Waley* v. *Johnston*, 316 U. S. 101, 104, and *Chambers* v. *Florida*, 309 U. S. 227, 236, with *Weeks* v. *United States*, 232 U. S. 383, and *Wolf* v. *Colorado*, 338 U. S. 25.

of the promise made by *Rea*, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as *Rea* and *Schnettler*, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States*, 357 U. S. 301, 313 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars* v. *United States*, 273 U. S. 28 (1927); *Lustig* v. *United States*, 338 U. S. 74 (1949).

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doc-

trine "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result.[9] But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity." 364 U. S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. *Elkins* v. *United States*, *supra*, at 218. The Court noted that

> "The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the

[9] As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U. S. 252, *Griffin* v. *Illinois*, 351 U. S. 12, and *Herman* v. *Claudy*, 350 U. S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

Federal Bureau of Investigation [10] has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive . . . . The movement toward the rule of exclusion has been halting but seemingly inexorable." *Id.*, at 218–219.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.[11] Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[10] See the remarks of Mr. Hoover, Director of the Federal Bureau of Investigation, FBI Law Enforcement Bulletin, September, 1952, pp. 1–2, quoted in *Elkins* v. *United States*, 364 U. S. 206, 218–219, note 8.

[11] Cf. *Marcus* v. *Search Warrants*, *ante*, p. —.

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1960.

Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[June 19, 1961.]

Mr. Justice Black, concurring.

For nearly fifty years, since the decision of this Court in *Weeks* v. *United States*,[1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In *Wolf* v. *Colorado*, decided in 1948, however, this Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[2] I concurred in that holding on these grounds:

> "For reasons stated in my dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal

[1] 232 U. S. 383, decided in 1914.
[2] 338 U. S. 25, 33.

exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem,[4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*.[5] There the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling

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[3] *Id.*, at 39–40.

[4] The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. See *Feldman* v. *United States*, 322 U. S. 487, 502–503 (dissenting opinion); *Frank* v. *Maryland*, 359 U. S. 360, 374–384 (dissenting opinion).

[5] 116 U. S. 616.

him to be a witness against himself."[6] It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case.[7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd* doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case:

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[8]

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[6] *Id.*, at 633.

[7] 338 U. S., at 47–48.

[8] 116 U. S., at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison: "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1789).

The case of *Rochin* v. *California*,[9] which we decided three years after the *Wolf* case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rutledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the *Rochin* case, three police officers, acting with neither a judicial warrant nor probable cause, entered Rochin's home for the purpose of conducting a search and broke down the door to a bedroom occupied by Rochin and his wife. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules. They immediately seized him and took him in handcuffs to a hospital where the capsules were recovered by use of a stomach pump. Investigation showed that the capsules contained morphine and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency. . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what

[9] 342 U. S. 165.

is in his stomach." [10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit of constitutional differentiation," [11] and the case was reversed on the ground that these methods had violated the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] 'a sense of justice'" and fails to "respect certain decencies of civilized conduct." [12]

I concurred in the reversal of the *Rochin* case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination applicable to the States and that, given a broad rather than a narrow construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak.[13] In reaching this conclusion I cited and relied on the *Boyd* case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in the minority for only MR. JUSTICE DOUGLAS and I rejected the flexible and uncertain standards of the "shock-the-conscience test" used in the majority opinion.[14]

Two years after *Rochin*, in *Irvine* v. *California*,[15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court

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[10] *Id.*, at 173.
[11] *Id.*, at 172.
[12] *Id.*, at 172, 173.
[13] *Id.*, at 174–177.
[14] For the dissent of MR. JUSTICE DOUGLAS see *id.*, at 177–179.
[15] 347 U. S. 128.

in that case demonstrate the utter confusion and uncertainty that had been brought about by the *Wolf* and *Rochin* decisions. In concurring, MR. JUSTICE CLARK emphasized the unsatisfactory nature of the Court's "shock-the-conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free." [16]

Only one thing emerged with complete clarity from the *Irvine* case—that is that seven Justices rejected the "shock-the-conscience" constitutional standard enunciated in the *Wolf* and *Rochin* cases. But even this did not lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in the *Irvine* case left the situation at least as uncertain as it had been before. Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock-the-conscience" standard of the *Wolf* and *Rochin* cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case. I fully agree with Mr. Justice Bradley's opinion that the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are

[16] *Id.*, at 138. See also *United States* v. *Rabinowitz*, 339 U. S. 56, 66–68 (dissenting opinion).

entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1960.

Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[June 19, 1961.]

Mr. Justice Douglas, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure. The police entered a home forcefully, and seized documents that were later used to convict the occupant of a crime.

She lives alone with her fifteen-year-old daughter in the second floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing." [1] To the appellant's question, however, they replied only that they wanted to question her and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only

[1] This "confidential source" told the police, in the same breath, that "there was a large amount of policy paraphernalia being hidden in the home."

when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene; and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant; but the officer refused to let her see it although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper;[2] breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and

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[2] The purported warrant has disappeared from the case. The State made no attempt to prove its existence, issuance or contents, either at the trial or on the hearing of a preliminary motion to suppress. The Supreme Court of Ohio said: "There is, in the record, considerable doubt as to whether there ever was *any* warrant for the search of defendant's home. . . . Admitted" . . . there was no warrant authorizing a search . . . for any 'lewd, lascivious book . . . print, [or] picture.'" 170 Ohio St. 427, 430, 166 N. E. 2d 387, 389. (Emphasis added.)

piece of furniture, while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession [3] of four little pamphlets, a couple of photographs and a little pencil doodle—all of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appellant's dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant—and a friend of hers—said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." *State* v. *Mapp*, 170 Ohio St. 427, syllabus 2; *State* v. *Lindway*, 131 Ohio St. 166. This evidence would have been inadmissible in a federal prosecu-

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[3] Ohio Rev. Code, § 2905.35: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture . . . or drawing . . . of an indecent or immoral nature . . . . Whoever violates this section shall be fined not less than two hundred dollars nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

tion. *Weeks* v. *United States*, 232 U. S. 383; *Elkins* v. *United States*, 364 U. S. 206. For, as stated in the former decision, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints . . . ." *Id.*, 391–392. It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in *Wolf* v. *Colorado*, 338 U. S. 25, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the *Weeks* case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle.

As stated in the *Weeks* case, if evidence seized in violation of the Fourth Amendment can be used against an accused "his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 U. S., at 393.

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, *Wolf* v. *Colorado*, at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. But as Mr. Justice Murphy said in *Wolf* v. *Colorado*, at 42, "Self-scrutiny is a lofty ideal but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. 338 U. S. 42–44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, *Wolf* v. *Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. See 338 U. S., at 47.

Wolf v. *Colorado, supra,* was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which *Wolf* imported into the law. See *Stefanelli* v. *Minard,* 342 U. S. 117; *Rea* v. *United States,* 350 U. S. 214; *Elkins* v. *United States, supra; Monroe* v. *Pape,* 365 U. S. 167. It is an appropriate case because the facts it presents show—as would few other cases—the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

It is also an appropriate case in the narrower and more technical sense. The issues of the illegality of the search and the admissibility of the evidence have been presented to the state court and were duly raised here in accordance with the applicable Rule of Practice.[4] The question was raised in the notice of appeal, the jurisdictional

[4] "The notice of appeal . . . shall set forth the questions presented by the appeal . . . . Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." Rule 10 (2) (c), Rules of the Supreme Court of the United States.

statement and in appellant's brief on the merits.[5] It is true that argument was mostly directed to another issue in the case, but that is often the fact. See *Rogers* v. *Richmond*, 365 U. S. 534, 535–540. Of course, an earnest advocate of a position always believes that, had he only an additional opportunity for argument, his side would win. But, subject to the sound discretion of a court, all argument must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here." *Elkins* v. *United States*, *supra*, 216.

Moreover, continuance of *Wolf* v. *Colorado* in its full vigor breeds the unseemly shopping around of the kind revealed in *Wilson* v. *Schnettler*, 365 U. S. 381. Once evidence, inadmissible in a federal court, is admissible in a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does not have the force of reason behind it.

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[5] "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution . . . ?"

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1960.

Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal From the Supreme Court of the State of Ohio.

[June 19, 1961.]

Memorandum of Mr. Justice Stewart.

Agreeing fully with Part I of Mr. Justice Harlan's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1960.

Dollree Mapp, etc., Appellant, v. Ohio.	On Appeal from the Supreme Court of the State of Ohio.

[June 19, 1961.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Whittaker join, dissenting.

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

I.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the *mere* knowing possession or control of obscene material,[1] and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth

[1] The material parts of that law are quoted in Note 1 of the Court's opinion. *Ante*, p. —.

Amendment.[2] That was the principal issue which was decided by the Ohio Supreme Court,[3] which was tendered by appellant's Jurisdictional Statement,[4] and which was briefed [5] and argued [6] in this Court.

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[2] In its Note 3, *ante*, p. —, the Court, it seems to me, has turned upside-down the relative importance of appellant's reliance on the various points made by him on this appeal.

[3] See 170 Ohio St. 427. Because of the unusual provision of the Ohio Constitution requiring "the concurrence of at least all but one of the judges" of the Ohio Supreme Court before a state law is held unconstitutional (except in the case of affirmance of a holding of unconstitutionality by the Ohio Court of Appeals), Ohio Const., Art. IV, § 2, the State Supreme Court was compelled to uphold the constitutionality of § 2905.34, despite the fact that four of its seven judges thought the statute offensive to the Fourteenth Amendment.

[4] Respecting the "substantiality" of the federal questions tendered by this appeal, appellant's Jurisdictional Statement contained the following:

"The Federal questions raised by this appeal are substantial for the following reasons:

"The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual 'to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional rights of the individual' (Justice Herbert's dissenting Opinion, Appendix 'A'). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code [the latter two Sections providing exceptions to the coverage of § 2905.34 and related provisions of Ohio's obscenity statutes] are read together, . . . they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due

(*Footnotes 5 and 6 are on p. 3*)

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided

process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the defendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions."

[5] The appellant's brief did not urge the overruling of *Wolf*. Indeed it did not even cite the case. The brief of the appellee merely relied on *Wolf* in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as *amici*, did in one short concluding paragraph of its argument "request" the Court to re-examine and overrule *Wolf*, but without argumentation. I quote in full this part of their brief:

"This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf* v. *Colorado*, 338 U. S. 25. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."

[6] Counsel for appellant on oral argument, as in his brief, did not urge that *Wolf* be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule *Wolf*, counsel expressly disavowed any such purpose.

wherever possible. For in overruling *Wolf* the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) [7] and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene,[8] surely presents a constitutional question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administra-

[7] "2905.37 LEGITIMATE PUBLICATIONS NOT OBSCENE.

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit.

"3767.01 (C)

"This section and Sections 2905.34, . . . 2905.37 . . . of the Revised Code shall not affect . . . any newspaper, magazine, or other publication entered as second class matter by the post-office department."

[8] The Ohio Supreme Court, in its construction of § 2905.34, controlling upon us here, refused to import into it any other exceptions than those expressly provided by the statute. See note 7, *supra*. Instead it held that "if anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty . . . ."

tion of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of *Wolf*, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the *Wolf* case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "non-exclusionary" aspect, *Wolf* did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States." *People* v. *Defore*, 242 N. Y. 13, 20. Though, of course, not reflecting the full measure of this continuing reliance, I find that during the last three Terms, for instance, the issue of the inadmissibility of illegally state-obtained evidence appears on an average of about fifteen times per Term just in the *in forma pauperis* cases summarily disposed of by us. This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf*, and that were we determined to re-examine that doctrine we would not lack future opportunity.

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argument is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit mis-

givings.[9] I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court was bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

II.

Essential to the majority's argument against Wolf is the proposition that the rule of *Weeks* v. *United States*, 232 U. S. 383, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amend-

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[9] See *Wolf* v. *Colorado*, 338 U. S., at 39–40; *Irvine* v. *California*, 347 U. S. 128, 133–134, and at 138–139. In the latter case, decided in 1954, Mr. Justice Jackson, writing for the majority, said (at p. 134): "We think that the *Wolf* decision should not be overruled, for the reasons so persuasively stated therein." Compare *Schwartz* v. *Texas*, 344 U. S. 199, and *Stefanelli* v. *Minard*, 342 U. S. 117, in which the *Wolf* case was discussed and in no way disapproved. And see *Pugach* v. *Dollinger*, 365 U. S. 458, which relied on *Schwartz*.

ment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, cf. *Wolf* v. *Colorado*, 338 U. S., at 39–40 (concurring opinion), I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is a "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.[10]

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 U. S., at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment

[10] Actually, only four members of the majority support this reasoning. See, p. —, *infra*.

which, as *Wolf* itself pointed out (338 U. S., at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (*Id.*, at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in *Wolf* of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a pre-existing legal context on which both interpreting decisions and enabling statutes must at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable"—say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy" (338 U. S., at 28), compare *Marcus* v. *Property Search Warrant*, —, U. S. —, what the Court is now doing is to impose upon the States not only federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards. For I think it entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing.

First, it is said that "the factual grounds upon which *Wolf* was based" have since changed, in that more States now follow the *Weeks* exclusionary rule than was so at the time *Wolf* was decided. While that is true, a recent survey indicates that at present one half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. Berman and Oberst, Admissibility of Evidence by an Unconstitutional Search and Seizure, 55 N. W. L. Rev. 525, 532–533. But in any case surely all this is besides the point, as the majority itself indeed seems to recognize. Our concern here, as it was in *Wolf*, is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the State on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Consti-

tutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough and ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a nonexclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in *People* v. *Defore*, 242 N. Y. 13, the *Weeks* exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forebear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the *Weeks* rule on the States, makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid "'needless conflict between state and federal courts.'" Indeed the majority now finds an incongruity in *Wolf's* discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's

remoteness from particular state problems, is for me the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the *Weeks* rule and its extensions in such cases as *Rea*, *Elkins*, and *Rios* [11] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review State procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance the California Supreme Court did in *People* v. *Cahan*, 44 Cal. 2d 434, with reference to procedures in the California courts or as this Court did in *Weeks* for the lower federal courts.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court, tested in some final appellate court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal then with a finished product in the creation of which we are allowed no hand, and our

[11] *Rea* v. *United States*, 350 U. S. 214; *Elkins* v. *United States*, 364 U. S. 206; *Rios* v. *United States*, 364 U. S. 253.

task, far from being one of overall supervision, is, speaking generally, restricted to a determination of whether the prosecution was constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the *Weeks* rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the *Weeks* rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of *Wolf* is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a statement which is procured during a period of illegal detention, *McNabb* v. *United States*, 318 U. S. 332, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such

statements. Indeed it would seem the Court laid at rest the very argument now made by the majority when in *Lisenba* v. *California*, 314 U. S. 219, a state coerced confession case, it said (at 235):

> "it may be assumed that [the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.
>
> "But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the constitutional question we must decide . . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that in requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the continent whereby the accused was interrogated for hours on end." *Watts* v. *Indiana*, 338 U. S. 49, 54. See *Rogers* v. *Richmond*, 365 U. S. 534, 541. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by

reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed., 1824), c. 46, § 34. That this is a *procedural right*, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, (see *ante*, p. ——), but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (see *ante*, p. ——).[12] On that score I need only say that whatever the validity of the "Fourth-Fifth Amendment" correlation which the *Boyd* case (116 U. S. 616) found, see 8 Wigmore, Evidence (3d ed. 1940), § 2184, we have only very recently again reiterated the long established doctrine of this Court that

[12] My Brother STEWART concurs in the Court's judgment on grounds which have nothing to do with *Wolf*.

the Fifth Amendment privilege against self-incrimination is not applicable to the States. See *Cohen* v. *Hurley*, — U. S. —.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.